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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL NO. 710 PENSION FUND, ET AL.,
Petitioners,

v.

WILLIAM R. JANOWSKI, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Under this Court's precedents, culminating in *Blum v. Yaretsky*, —— U.S. ——, 50 L.W. 4859 (June 25, 1982), is an action by a pension plan participant to invalidate a provision of the plan as violative of ERISA justiciable where the plan participant does not allege or show that he is or may be affected by the challenged provision and has never applied for or been denied benefits under the plan?

2.a) May a federal court award attorneys' fees to a plaintiff in a suit under ERISA based on all hours spent by his attorneys in litigating the action where the plaintiff prevailed on only one of five separate and distinct claims?

b) May a federal court of appeals affirm in full a district court's award of attorneys' fees where

1) the court of appeals has reversed three of the four liability determinations which the district court has made;

2) the district court had awarded a multiplier of 2 for all hours expended by the plaintiffs' attorneys in the litigation; and

3) the district court in fixing the award had placed reliance on the substantial assets of the defendant pension fund (while disregarding its substantial actuarial liabilities), and on the amount of attorneys' fees expended by the fund in matters unrelated to the litigation?*

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* The parties hereto are: William R. Janowski and Robert H. Barnhisel, individually and on behalf of all others similarly situated, plaintiffs-respondents.

International Brotherhood of Teamsters Local No. 710 Pension Fund and William D. Joyce, John D. Kelahan, Anthony Curcio, Robert J. Baker, John J. Barranco and Roy M. Pride, Trustees of the Fund, defendants-petitioners.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. The Complaint and the District Court's Class Action Decision	3
B. The District Court's Decision on the Cross-Motions For Summary Judgment	5
C. The District Court's Decision on Attorneys' Fees	6
D. The Decision of the Court of Appeals	8
REASONS FOR GRANTING THE WRIT	9
I. The Decision of the Court of Appeals that Plaintiffs Have Standing to Challenge the Part-Time Service Credit Provision of the Plan Is Clearly Inconsistent with the Article III Decisions of this Court Culminating in *Blum v. Yaretsky* and Raises an Important and Recurring Issue Under ERISA	9
II. The Court of Appeals' Affirmance of the Attorneys' Fee Award Raises an Issue Which This Court Has Already Agreed to Decide and Additional Issues Warranting the Exercise of This Court's Supervisory Powers	14

TABLE OF CONTENTS—Continued

Page

A. This Court Has in Two Cases Agreed to Decide Whether a Plaintiff May Be Awarded Attorneys' Fees for Time Spent In Litigating Claims on Which the Defendant Prevailed 14

B. In Affirming the District Court's Award of Attorneys' Fees the Court of Appeals Committed Three Additional Errors Which Should Be Corrected in the Exercises of This Court's Supervisory Powers 18

CONCLUSION 23

APPENDIX (Separately Bound)

INDEX OF CITATIONS

CASES: Page

Albemarle Paper Co. v. Moody, 422 U.S. 405 19
Ashcroft v. Planned Parenthood Assn. of Kansas City, Missouri, Inc., No. 81-1623, cert. granted 50 L.W. 3934 (May 24, 1982) 15, 16
Bartholomew v. Watson, 665 F.2d 910 (C.A. 9) 14
Blum v. Yaretsky, —— U.S. ——, 50 L.W. 4859 (decided June 25, 1982) ..... i, 9, 10, 11, 13
Califano v. Yamasaki, 442 U.S. 692 13
City of Detroit v. Grinnell Corp., 560 F.2d 1093 (C.A. 2) 18
Copeland v. Marshall, 641 F.2d 880 (C.A. D.C.) 14, 15, 22
General Telephone Co. of Southwest v. Falcon, —— U.S. ——, 50 L.W. 4638 (decided June 14, 1982) 11
Gurule v. Wilson, 635 F.2d 782 (C.A. 10) 14
Hensley v. Eckerhart, No. 81-1244, cert. granted 50 L.W. 3695 (March 1, 1982) 15, 16
Hughes v. Repko, 578 F.2d 483 (C.A. 3) 14
Jones v. Diamond, 636 F.2d 1634 (C.A. 5), cert. den., 453 U.S. 950 14
Lake Carriers' Assn. v. MacMullan, 406 U.S. 498 12
Lugo v. Employees' Retirement Fund, 529 F.2d 251 (C.A. 2) 12
Machinists v. Street, 367 U.S. 740 13
Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270 12
Muscare v. Quinn, 614 F.2d 577 (C.A. 7) 15
Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359 22
Nadeau v. Helgemoe, 581 F.2d 275 (C.A. 1) 14
Nat. Ass'n. of Concerned Vets v. Sec. of Defense, 675 F.2d 1319 (C.A. D.C.) 15
Northcross v. Board of Ed., Memphis City Schools, 611 F.2d 624 (C.A. 6), cert. den., 447 U.S. 911 15
Oliver v. Kalamazoo Bd. of Ed., 576 F.2d 714 (C.A. 6) 21
Oser v. Wilcox, 338 F.2d 886 (C.A. 9) 20
O'Shea v. Littleton, 414 U.S. 488 12

INDEX OF CITATIONS—Continued

	Page
Planned Parenthood v. Ashcroft, 655 F.2d 848 (C.A. 8), cert. granted, 50 L.W. 3934 (May 24, 1982)	15
Prandini v. National Tea Co., 557 F.2d 1015 (C.A. 3)	21
Pullman-Standard Co. v. Swint, —— U.S. ——, 50 L.W. 4425 (decided April 27, 1982)	20
Reid, Hewitt Company v. Joseph, [1918] A.C. 717	17
S.E.C. v. Chenery Corp., 318 U.S. 80	20
Schlesinger v. Reservists to Stop the War, 418 U.S. 208	11
Stewart v. M. M. & P. Pension Plan, 608 F.2d 776 (C.A. 9)	6, 12
Trustees v. Greenough, 105 U.S. 527	19
Twentieth-Century Fox Film Corp. v. Brookside Theater Corp., 194 F.2d 846 (C.A. 8)	18
United States v. Burr, 25 F. Cas. 30 (CC Va. 1807)	19
Valley Forge v. Americans United, —— U.S. ——, 50 L.W. 4102 (decided January 12, 1982)	11
Warth v. Seldin, 422 U.S. 490	11, 13
Younger v. Harris, 401 U.S. 37	10
CONSTITUTIONS, STATUTES AND RULES:	
United States Constitution:	
Article III	2, 11, 12
STATUTES:	
Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C. § 1988	16, 21
Employees Retirement Income Security Act of 1974, 88 Stat. 891, as amended, 94 Stat. 1295, 29 U.S.C. §§ 1001 *et seq.*:	
§ 2(a)	22
§ 502	2
§ 502(a)(1)	2, 12, 13
§ 502(a)(3)	2, 5, 6, 13
§ 502(g)	2, 6, 8, 21

INDEX OF CITATIONS—Continued

	Page
Internal Revenue Code:	
26 U.S.C. § 411(b)(3)(B)	8
Judicial Code:	
28 U.S.C. § 1254(1)	2
20 U.S.C. § 617	21
RULES:	
Federal Rules of Civil Procedure:	
Rule 23(b)(2)	5
MISCELLANEOUS:	
Brief for Respondents, No. 81-1244	16
Promoting the Vindication of Civil Rights Through The Attorneys' Fees Awards Act, 80 Col. L. Rev. 346	16, 17
Yeats, W. B., "An Irish Airman Foresees His Death"	9

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 673 F.2d 931. It is reproduced at pp. 1a-2a of the separately bound appendix to this petition (App.). The District Court wrote three opinions, none of which has been officially reported. The District Court's decision on class action is reproduced at App. 25a-28a; its decision on cross-motions for summary judgment is reproduced at App. 29a-36a, and its decision on attorneys' fees is reproduced at App. 40a-47a.

JURISDICTION

The decision of the Court of Appeals and its Order (App. 21a-22a) were issued on March 8, 1982. A timely petition for rehearing and rehearing en banc was filed on April 7, 1982 (App. 23a-29a). On July 7, 1982 Justice Stevens entered an Order extending the time for fil-

ing this petition to and including July 27, 1982 (App. 50a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, § 2 of the United States Constitution provides in pertinent part as follows:

> The Judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States * * *.

Section 502 of the Employee Retirement Income Security Act of 1974, as amended (ERISA), 88 Stat. 891, 29 U.S.C. § 1132, as amended 94 Stat. 1295 provides in pertinent part as follows:

> (a) A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> * * * *
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;
>
> * * * *
>
> (g)(1) In any action under this title (* * *) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

STATEMENT OF THE CASE

A. The Complaint and the District Court's Class Action Decision

Petitioner, International Brotherhood of Teamsters, Local No. 710 Pension Fund ("the Fund" or "the Plan") is a jointly administered multiemployer defined benefit pension plan. The individual petitioners are the trustees of the Plan responsible for establishing its eligibility requirements and administering it. (The petitioners will sometimes be jointly referred to herein as "defendants".)

The individual respondents ("plaintiffs") are two participants in the Plan.

In this action plaintiffs challenge several amendments to the Plan, which had been adopted by the trustees in light of the enactment of ERISA, and which had been submitted to and approved by the Internal Revenue Service on September 26, 1977. (R. 15, pp. 2-3, 8-9, 11-13).[1] As the case presently stands, only one of the plaintiffs' challenges has been sustained—that the Plan does not properly credit part-time services. The present petition does not seek review of this ruling. Rather this petition is addressed 1) to the determination by the courts below that the plaintiffs' challenge to the legality of the part-time service credit rule is justiciable although neither made any showing that he was or could be affected thereby, and 2) to the award to plaintiffs of attorneys' fees of $142,485 which is excessive for several reasons, including that it was calculated on the basis of time spent by plaintiffs in litigating each of their claims although *defendants* prevailed on all but one.

The original complaint was filed on March 6, 1978; an amended complaint—on which the case has proceeded—

[1] "R." refers to the Record in the District Court, which became part of the record in the Court of Appeals; the first number following "R." is the item designation.

was filed on March 20, 1978. Because this petition does not address the merits of plaintiffs' several claims of illegality, these allegations of their complaint need only be summarized:

1) Section 1.16 of the amended Plan improperly altered the "normal retirement age" from 57 to 65.[2]

2) Section 3.10 of the amended Plan did not properly compute benefits accrued for services prior to February 1, 1976.[3]

3) Section 4.04 of the amended Plan does not properly credit part-time services.

4) Section 3.08 of the amended Plan sets out a deficient schedule for awarding of early retirement benefits.

5) Section 3.09 of the amended Plan improperly reduced vested retirement benefits.

Plaintiffs did not allege that either of them was or might be injured by any of the provisions of the amended Plan which they challenged; nor did either allege that he had made an application for or been denied any benefits under the Plan. The only allegations which even bear on plaintiffs' right to bring this suit are that both are participants in the Plan and had been participants for more than twenty years (Amended Complaint, Par. 4).

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[2] On the basis of this alleged violation plaintiffs contended that they were deprived of

(a) The right to have actuarial reductions based upon age 67 rather than age 65 for benefits commencing prior to age 57;

(b) The right to have benefits commence at age 57 rather than at age 65; and

(c) The right to pre-retirement survivor benefits between ages 47 and 57 rather than between ages 55 and 65. Plaintiffs renew the contention that the "normal retirement age" under the amended Plan is illegal in their petition for certiorari, No. 82-37, *William R. Janowski et al. v. International Brotherhood of Teamsters Local No. 710 Pension Fund et al.*

[3] This issue is also tendered by plaintiffs in No. 82-37.

In opposing class certification defendants urged, *inter alia*, that plaintiffs lacked standing to challenge the amendment and that their claims were not ripe. Defendants pointed out specifically that the plaintiffs had shown no injury, present or prospective, from the part-time service credit provision, § 4.04. (Defendants' Memorandum in Opposition to Class Certification, pp. 3, 5-7).

In its Decision on Class Action, the District Court rejected defendants' justiciability objections. The court did not find that plaintiffs had alleged or shown any injury, present or prospective, with respect to any of the claims. Rather, the court said only that they were given the right to sue by § 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), quoted at p. 2, *supra*.

The court certified a class under F.R.C.P. Rule 23(b)(2) as follows:

> All persons who are now, or who were as of February 1, 1976 members of Local 710 of the International Brotherhood of Teamsters and who have accepted early retirement or intend to do so under the terms of the Pension Plan of said Local 710 and whose early retirement benefits were or will be affected by the amendments to the Plan made as of February 1, 1976. [App. 28a] [4]

B. The District Court's Decision On The Cross-Motions For Summary Judgment

Plaintiffs and defendants moved for summary judgment on the merits. Defendants renewed their submission that neither of the plaintiffs presented a justiciable claim because of lack of standing and ripeness. It was

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[4] The court modified plaintiffs' more ambitious request:

> All persons who are now, or who were as of February 1, 1976, members of Local No. 710 of the International Brotherhood of Teamsters and who have accrued benefits subject to the terms of the Pension Plan of said local as amended effective February 1, 1976. [App. 25a]

again specifically urged that neither of the plaintiffs had been affected by the application of the past-service credit rule in § 4.04 of the Plan (Memorandum in Support of Defendants' Motion For Summary Judgment, p. 6).[5]

In ruling on the motions for summary judgment the District Court "reject[ed] preliminary challenges to plaintiffs' right to bring this action"; the court again cited only 29 U.S.C. § 1132(a)(3) (App. 29a). On the merits the District Court ruled in the defendants' favor with respect to the "normal retirement age" claim (App. 30a-31a) and in plaintiffs' favor on each of the other claims (App. 32a-35a). The court subsequently entered an order incorporating its rulings (App. 37a-39a).

C. The District Court's Decision On Attorneys' Fees

The District Court issued a separate decision awarding attorneys' fees to plaintiffs. It determined that such fees are authorized by § 502(g) of ERISA, reproduced at p. 2, *supra*, and that plaintiffs were entitled to attorneys' fees although they "were only partially successful," because "this is a matter to be considered in measuring the amount, not the entitlement" (App. 41a). However, in determining the amount, the court allowed plaintiffs' attorneys to recover for all hours spent on the case, deducting nothing for the time spent in litigating the "normal retirement age" issue (App. 42a). The court, taking into account both inflation and a contingency factor, found that the hourly rate ($100.00 per hour) which plaintiffs' lead counsel sought was reasonable, although this attorney had previously charged for his time at lower rates (42a-43a). The court then turned to the question of whether it should award a multiplier for the fee at the foregoing hourly

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[5] Defendants also called the court's attention to the then recent decision in *Stewart v. M.M. & P. Pension Plan*, 608 F.2d 776, 782-785 (C.A. 9) described at p. 12, n.10, *infra*. (Memorandum in Support of Defendants' Motion For Summary Judgment, p. 7, n.11).

rate and if so what the multiplier would be, Mr. Grasso (plaintiffs' lead counsel) having sought a multiplier of 3 and two of his partners a multiplier of 2. In deciding that a multiplier should be used the court took into account two factors: "the contingency of prevailing in representation" and "the financial results obtained". In the latter connection the court determined that under its ruling regarding the computation for accrued benefits, § 3.10, the affected retirees would receive "benefits averaging from $48,960 to $58,140, with a total estimated by the court of almost $7½ million (App. 44a). The court also stated its belief that other benefits it had awarded "will be substantial" (*id.*). The court therefore concluded that a multiplier of 2 should be awarded. In rejecting a higher multiplier it relied on three considerations: 1) The plaintiffs were not wholly successful; 2) their attorneys' fees must be paid out of the pension fund itself; and 3) a multiplier higher than 2 is ordinarily used where the defendants have been guilty of some knowing or at least notorious violation of the law (App. 45a).

The result was that the plaintiffs' attorneys were awarded fees at *twice* their hourly rate for *all* time spent in the litigation. Defendants had urged that in calculating the fee the court should take into account the fact that "whatever fees are paid must come out of the finite amount of the pension fund". The District Court took a contrary view:

> If the fund were not sufficient to pay all the benefits, then defendants' contention that the fees must come out of benefits to be paid to persons not affected by our decision would be more plausible. However, plaintiffs point out that the fund now amounts to over $222,500,000 and that the plan's assets increased by more than $27 million over the payments of benefits during the fiscal year ending January 31, 1980. Finally, the fund itself paid $1,158,861 in attorney fees for fiscal year ending January 31, 1980, com-

> pared to which the fees for plaintiffs' attorneys would be a relatively small burden. [App. 45a].[6]

The total fee awarded was $142,485.000 (App. 49a).

D. The Decision of The Court of Appeals

Both sides appealed. The Court of Appeals ruled, in presently pertinent part, as follows:

1) The defendants' contention that the District Court was without subject matter jurisdiction for lack of standing and ripeness was rejected (App. 3a, 5a, discussed at pp. 12-13, *infra*).

2) The Court of Appeals affirmed the dismissal of plaintiffs' "normal retirement age" claim (App. 6a-10a). On defendants' appeal, the Court of Appeals reversed three of the four determinations of liability which had been made by the District Court. The only finding of a violation which was sustained was the District Court's view that § 4.04 of the Amended Plan does not provide a "sufficiently ratable" allocation for part-time service to satisfy 26 U.S.C. § 411(b)(3)(B) and its implementing regulation.

3) The District Court's award of attorneys' fees was affirmed in full. The Court of Appeals agreed that plaintiffs were entitled to an award under § 502(g) of ERISA (a point which we do not here contest). And despite its disapproval of all but one of the illegality findings, the appellate court "adopt[ed] the district courts' analysis and conclusion with respect to the amount awarded" (App. 18a). The Court of Appeals' discussion in affirming the total fee award is set forth in full at p. 18, n.18, *infra*.

In a partial dissent, Judge Fairchild declared, *inter alia*, that the attorneys' fees award was too high because

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[6] The court also determined that this was not an appropriate case for requiring the plaintiffs to exhaust their remedies under the procedures provided by the pension plan (App. 3a-5a). We do not pursue this point here.

of the appellate court's liability conclusions. (App. 20a, quoted at p. 19 *infra.*)

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS THAT PLAINTIFFS HAVE STANDING TO CHALLENGE THE PART-TIME SERVICE CREDIT PROVISION OF THE PLAN IS CLEARLY INCONSISTENT WITH THE ARTICLE III DECISIONS OF THIS COURT CULMINATING IN *BLUM v. YARETSKY* AND RAISES AN IMPORTANT AND RECURRING ISSUE UNDER ERISA.

A. The courts below did not find, and there is nothing in the record showing that either plaintiff would be affected in any way by a determination that the part-time service credit provisions of the Plan do not comply with ERISA. Like Kiltartan's poor, "No likely end would bring them loss or leave them happier than before."[7] Under these circumstances, the courts below lacked subject matter jurisdiction over the claim that this provision violates ERISA.

Blum v. Yaretsky (hereafter *Yaretsky*), —— U.S. ——, 50 L.W. 4859 (decided June 25, 1982) declared the governing principle:

> It is axiomatic that the judicial power conferred by Art. III may not be exercised unless the plaintiff shows "that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). It is not enough that the conduct of which the plaintiff complains will injure *someone.* The complaining party must also show that he is within the class of persons who will be concretely affected. Nor does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the neces-

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[7] W. B. Yeats, "An Irish Airman Foresees His Death".

> sary stake in litigating conduct of another kind, although similar, to which he has not been subject. See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-167 (1972). [50 L.W. at 4861, slip op., p. 7, emphasis in original.]

Applying these principles this Court concluded that the respondents, who were medicare patients in a skilled nursing facility had standing to challenge the procedures for facility-initiated discharges and transfers to lower levels of care, because the possibility that the nursing homes in which they resided would make such a determination was "not 'imaginary or speculative'". 50 L.W. at 4861, sl. op. 8, quoting *Younger v. Harris*, 401 U.S. 37, 42. But the respondents in *Yaretsky* were held to lack standing to challenge the procedures governing transfers to *higher* levels of care:

> We cannot conclude, however, that the threat of transfers to *higher* levels of care, whether initiated by the URC's, the nursing homes, or attending physicians, is "of sufficient immediacy and reality," *Golden v. Zwickler*, 394 U.S. 103, 108 (1969), that respondents have standing to seek an adjudication of the procedures attending such transfers. Nothing in the record available to this Court suggests that any of the individual respondents have been either transferred to more intensive care or threatened with such transfers. It is not inconceivable that respondents will one day confront this eventuality, but assessing the possibility now would "tak[e] us into the areas of speculation and conjecture." *O'Shea v. Littleton*, *supra*, at 497. [50 L.W. at 4861, slip op. pp. 8-9, emphasis in original]

Neither of the plaintiffs here has shown that he himself has been denied any credits for part-time services under § 4.04 of the amended Plan; nor has either asserted (let alone established) that there is any likelihood that he will perform part-time services in the future and that his pension eligibility or benefits will be affected by

this provision. Moreover, neither of the plaintiffs has applied for (let alone been denied) any benefits under the Plan. It is therefore clear that their interest in the Plan's part-time service credit formula lacks "sufficient immediacy and reality" to satisfy the requirements under Article III, as elaborated in *Yaretsky*.

Yaretsky is directly on point in two additional respects:

Even as *Yaretsky* denied standing to the plaintiffs with respect to the procedures regarding transfers to higher-levels of care although granting standing with respect to discharges and transfers to lower levels of care, so the present plaintiffs do not have standing to raise the part-time service credit issue even though they may arguably have standing to challenge other provisions of the Local No. 710 Plan. 50 L.W. at 4861, 4862, sl. op. 8, 10. Moreover, it would avail plaintiffs nothing to argue that other members they represent are affected by the challenged part-time service credit policy. *Yaretsky*, 50 L.W. at 4861, n.13; *General Telephone Co. of Southwest v. Falcon*, —— U.S. —— 50 L.W. 4638 (decided June 14, 1982).[8]

B. The standing principle declared and followed in *Yaretsky* is not novel. See, in addition to the cases cited therein, *e.g.*, *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 216, 220-221; *Warth v. Seldin*, 422 U.S. 490, 498-499; *Valley Forge v. Americans United*, —— U.S. —— 50 L.W. 4102, 4105-4106, sl. op. pp. 6-9 (decided January 12, 1982). Moreover, as the Court noted in *Warth*, the "standing question * * * bears close affinity to questions of ripeness—whether the harm asserted has matured sufficiently to warrant judicial inter-

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[8] Actually, there is no showing that *any* member of the class would be adversely affected, because the class was defined in terms of plaintiffs' entirely distinct claim that the Plan's early retirement provisions are illegal. See p. 5, *supra*.

vention—and of mootness * * *". 422 U.S. at 499, n.10, citing, as to ripeness, *Lake Carriers' Assn. v. MacMullan*, 406 U.S. 498.[9] And consistent with this Court's teachings, in applying the ripeness element of justiciability the lower courts have previously held that a pension plan participant does not raise a controversy which the federal courts have power to entertain unless he can show a present or imminently threatened injury.[10]

C. In rejecting defendants' objection that the District Court lacked subject matter jurisdiction, the Court of Appeals did not discuss any of this Court's decisions, or even mention Article III of the Constitution. The Court placed exclusive reliance on § 502(a)(1) of ERISA which "provides that a civil action may be brought 'by a participant . . . to clarify his rights to future benefits under the Plan . . .'" In the Court's view, "this action is pre-

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[9] *O'Shea v. Littleton*, 414 U.S. 488, which was cited in *Yaretsky*, (see p. 10, *supra*) also illustrates the close relationship between standing and ripeness in determining whether plaintiffs "satisfy the threshold requirement imposed by Art. III of the Constitution that those who seek to invoke the power of federal courts must allege an actual case or controversy." (414 U.S. at 493; see *id.* at 493-499).

[10] In *Lugo v. Employees' Retirement Fund*, 529 F.2d 251 (C.A. 2) the court, following *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, and *Lake Carriers' Assn.*, *supra*, concluded:

> The possibility, or even, if such it is, the certainty that the Fund will invoke the 90/10 rule that Lugo claims is illegal to deny his application for a retirement pension at age 60 causes him no injury now, nor is he imminently threatened with such injury. The interest he asks us to defend has little "immediacy and reality." [529 F.2d at 257-258].

The decision in *Lugo* was approved in *Stewart v. M.M. & P. Pension Plan*, 608 F.2d 776, 782-784 (C.A. 9). The Ninth Circuit undertook a thorough discussion of the justiciability requirements of Article III of the Constitution and dismissed a participant's challenge of the trustees' interpretation of the plan because "he has neither averred nor shown that he intends to retire and apply for retirement benefits until some unspecified time in the future." (*Id.* at 784).

cisely the type of action contemplated by the statute." (App. 5a). But even if this interpretation of the statute is correct,[11] the failure to consider constitutional limitations was fundamental error. *Warth v. Seldin*, *supra*, makes this clear: "* * * Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." (422 U.S. at 501).

Adherence to established standards of justiciability is of special importance in determining whether a court may entertain suit under ERISA. There are, throughout the United States, many tens of thousands of covered private pension plans. Most, if not all of these plans have one or more provisions concerning which, on their face, or in application to individual situations, a question of compliance with the complicated terms of ERISA can be raised. The legal mind, particularly when inspired by the lure of a generous fee award, can readily conjure up a series of abstract claims of illegality; the multifaceted complaint herein evidences that this concern is not chimerical. Thus, the view of the Court of Appeals, which allows pension plan participants to bring suit to challenge plan provisions without showing that they will be affected thereby at the time of suit as the lower courts

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[11] We do not concede that either § 502(a)(1)(B) of ERISA, or § 502(a)(3) (which was relied on by the District Court, but not by the Court of Appeals) authorizes pension plan participants to sue to invalidate plan provisions which do not affect them. In construing a general grant of jurisdiction the courts should not lightly attribute to Congress the intent to ignore accepted principles of justiciability. Cf., *e.g.*, *Califano v. Yamasaki*, 442 U.S. 682, 692-693; *Machinists v. Street*, 367 U.S. 740, 749-750. However, while we reserve this underlying statutory issue, we do not argue it herein, because the decision below is so clearly contrary to Constitutional restrictions on federal jurisdiction. Cf. *Yaretsky*, *supra*, where the Court deemed it unnecessary even to identify the jurisdictional statute which the plaintiffs had invoked in bringing suit.

have previously required, or even at some time thereafter, bids fair to flood the federal courts with pension litigation.

II. THE COURT OF APPEALS' AFFIRMANCE OF THE ATTORNEYS' FEE AWARD RAISES AN ISSUE WHICH THIS COURT HAS ALREADY AGREED TO DECIDE AND ADDITIONAL ISSUES WARRANTING THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS.

A. This Court Has In Two Cases Agreed To Decide Whether a Plaintiff May Be Awarded Attorneys' Fees For Time Spent in Litigating Claims On Which the Defendant Prevailed.

The District Court awarded attorneys' fees to plaintiffs for all the time spent in litigating the present suit although it rejected their claim that the definition of "normal retirement age" in § 1.16 of the amended Plan is illegal (p. 6, *supra*). The Court of Appeals affirmed the total award although it decided against plaintiffs with respect to the § 1.16 claim and three others (p. 8, *supra*). Consequently, plaintiffs' attorneys are being rewarded for services performed in prosecuting five separate claims, although they prevailed on only one, and the defendants are being required to pay the fees for all the time spent by the attorneys on both sides in this litigation, although four of those five claims were determined in defendants' favor.

The propriety of calculating the award thus generously is a question which has divided the Court of Appeals. The First, Third, Fifth, Ninth, Tenth and District of Columbia Circuits have held that counsel should not be compensated for time spent on losing claims.[12] The Sixth

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[12] See, *e.g.*, *Nadeau v. Helgemoe*, 581 F.2d 275, 278-279 (C.A. 1); *Hughes v. Repko*, 578 F.2d 483, 487 (C.A. 3); *Jones v. Diamond*, 636 F.2d 1364, 1382 (C.A. 5 en banc), cert. den., 453 U.S. 950; *Bartholomew v. Watson*, 665 F.2d 910, 914 (C.A. 9); *Gurule v. Wilson*, 635 F.2d 782, 794 (C.A. 10, on rehearing); *Copeland v. Marshall*, 641 F.2d 880, 891-892, text and note at n.18 (C.A. D.C. en banc).

and Eighth Circuits like the Seventh in this case, have approved fees for all hours spent.[13] The Court has agreed to resolve the conflict in two pending cases: *Hensley v. Eckerhart*, No. 81-1244, cert. granted, 50 L.W. 3695 (March 1, 1982) and *Ashcroft v. Planned Parenthood Assn. of Kansas City, Missouri, Inc.*, No. 81-162, cert. granted, 50 L.W. 3934 (May 24, 1982). We therefore consider it to be unnecessary to demonstrate further that review of this issue is appropriate. Given the pendency of those cases our comments on the merits of the issue will be brief.

We believe that a succinct statement of the correct test was set forth by Judge McGowan for the District of Columbia Circuit, sitting en banc in *Copeland v. Marshall*, 641 F.2d 880:

> • • • no compensation should be paid for time spent litigating claims upon which the party seeking the fee should not ultimately prevail.[18]

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[18] *E.g., Oldham v. Ehrlich*, 617 F.2d 163, at 168 n.9 (8th Cir. 1980); *Dillon v. AFBIC Devel. Corp.*, 597 F.2d 556, 564 (5th Cir. 1979); *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978). However, it sometimes will be the case that a lawsuit will seek recovery under a variety of legal theories complaining of essentially the same injury. A district judge must take care not to reduce a fee award arbitrarily simply because a plaintiff did not prevail under one or more of these legal theories. No reduction in fee is appropriate where the "issue was all part and parcel of one matter," *Lamphere v. Brown Univ.*, 610 F.2d 46, 47 (1st Cir. 1979), but only when the claims asserted "are truly fractionable," *id.*

[641 F.2d at 891-892, reaffirmed in *Nat. Ass'n of Concerned Vets. v. Sec. of Defense*, 675 F.2d 1319, 1327, text and note at n.13].

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[13] See, *e.g., Northcross v. Board of Ed., Memphis City Schools*, 611 F.2d 624, 636 (C.A. 6), cert. den., 447 U.S. 911; *Planned Parenthood v. Ashcroft*, 655 F.2d 848, 872 (C.A. 8), cert. granted, 50 L.W. 3934 (May 24, 1982). The Seventh Circuit had previously reached a different result from that herein, see *Muscare v. Quinn*, 614 F.2d 577, 580-581 (C.A. 7).

Under the foregoing approach a plaintiff is treated as the prevailing party, and therefore may be awarded fees even if he is successful on only one claim. Moreover, he may be credited for time spent in pursuing alternative theories in support of that claim, although only one theory persuaded the court, and in pursuing alternative remedies for the same violation. On the other hand, plaintiffs will not be encouraged by the hope of enlarging the fee award to add unmeritorious claims,[14] and parties which successfully defend against claims will be protected against the unfairness of having to pay for time spent by their adversary, as well as for that of their own counsel. The contrary rule followed below is too radical a departure from the American rule to have been authorized by Congress [15] or to be imposed by the courts

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[14] *See, Promoting the Vindication of Civil Rights Through the Attorneys' Fees Awards Act*, 80 Col. L. Rev. 346 (hereafter Columbia Note):

> At one end of the spectrum, the court can reimburse a "prevailing plaintiff" for all of the expenses incurred by counsel. This is the method usually used when the plaintiff prevails on all his claims. This system is fair to the winning attorney and is consistent with the literal language of the statute; however, it can lead to unfair results when a plaintiff who has succeeded on less than all the issues demands attorney fees. If all his costs are refunded, the court is in effect rewarding the joinder of meritless claims. This encourages plaintiffs to plead frivolously and burdens the court with extra litigation. To discourage such pleading, the court should count only those hours spent on claims that succeeded. [*Id.* at 376.]

[15] It should be noted that *Hensley* and *Ashcroft*, in contrast to this case, involve the Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C. § 1988. And respondents in *Hensley* rely heavily on the legislative history of that Act. (Brief for Respondents, No. 81-1244, pp. 32-45). But that history does not purport to declare standards for actions not involving the strong public policy favoring the vindication of civil rights. Even if the *Hensley* respondents' view of 1976 Act's legislative history is correct, it is entirely consistent with our position here. For the District Court decisions which, in their view were approved by Congress, decided, as they observe

where Congress has not spoken. In this connection, the views of the House of Lords, although of course not authoritative, are instructive:

> If the proviso to Order LV. were read as providing that the costs were to follow the event in the sense of giving the costs of all the issues to the party who had recovered something in the action while he had failed upon most of the issues, it would have introduced a startling novelty while its object was to keep up the old practice as to costs. Such an alteration would, moreover, in its working have been inequitable, and it cannot be supposed that, without any reason for it, an innovation of this kind was contemplated by those who framed it or by the Legislature which sanctioned the order. It is not to the purpose to argue that the injustice which would arise under the order so construed might be corrected by the exercise of the special power to order otherwise for good cause conferred upon the judge of the Court. [*Reid, Hewitt & Company v. Joseph*, [1918] A.C. 717, 725).] [16]

(*id.* at 35), that "Legal services for a prevailing party were reasonably expended unless * * * they were spent on claims so wholly unrelated, causes of action so clearly separable, or issues so distinguishable and discrete that, looking at the case as a whole, the time involved in preparing, proving, or litigating them had in no way contributed to the 'ultimate result achieved,' *Davis v. County of Los Angeles, supra*, 8 E.P.D. [¶ 9444] at 5049; *Stanford Daily v. Zurcher, supra*, 64 F.R.D. [680] at 684."

[16] Also revealing is the Columbia Note's description of "the European concept of 'legal necessity' ":

> Under that procedure, the test for compensation is whether a given step was necessary to obtain the relief afforded: if the maneuver was required by the adjudicatory process, then the hours spent handling that step are fully compensable, but if it was irrelevant to the ultimate judgment, the party must pay for it himself. In deciding what steps—and even what pleadings—were necessary, a court using this test must reimburse the claimant for hours spent on all activities that reasonably helped him on the claims he won. Time spent on irrelevant claims would not be compensated because joinder of meritless

B. In Affirming The District Court's Award Of Attorneys' Fees The Court Of Appeals Committed Three Additional Errors Which Should Be Corrected In The Exercise Of This Court's Supervisory Powers.

"[I]t is the duty of appellate courts to protect against 'vicarious generosity' in the matter of attorney fees." [17] In affirming the award in this case the court below defaulted on that duty in three respects apart from the apportionment issue just discussed. Because of their cumulative effect herein and their broad applicability under statutes which authorize the federal courts to make fee awards these errors should be reviewed and corrected in the exercise of this Court's supervisory powers.

1. In passing on the amount of the attorneys' fee award the Court of Appeals "adopt[ed] the district court's analysis and conclusion with respect to the amount awarded * * *" (App. 18a).[18] This course was error even

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pleadings would not be deemed helpful in obtaining the final judgment. Even if the standard were interpreted liberally, court congestion could be further controlled by allowing defendants fees when plaintiffs litigate frivolous issues and through use of the common law and statutory bad faith exceptions. [80 Col. L. Rev. at 376-377, footnotes omitted.]

[17] *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093, 1102 (C.A. 2) quoting with approval *Twentieth-Century Fox Film Corp. v. Brookside Theater Corp.*, 194 F.2d 846, 859 (C.A. 8).

[18] The Court of Appeals' discussion of this issue reads in full as follows:

> Finally, we consider the amount of the award. The district court carefully and thoroughly analyzed the complexity and unsettled nature of the questions involved, the expertise of the attorneys, and the time expended to arrive at the hourly rate of $100 and $125 and the multiplier of two. We adopt the district court's analysis and conclusion with respect to the amount awarded and, as a consequence, need not repeat it. Because the award was based on several factors, only one of which was whether Janowski was the prevailing party, nothing in our decision requires recomputation of the amount awarded. [App. 18a]

if it be assumed (contrary to our submission) that the District Court's analysis was, as the court of appeals believed, correct. For, that analysis was based on the view that four of the five rules which the plaintiffs had attacked were illegal, a premise which was rejected on appeal. In consequence, *neither the District Court nor the Court of Appeals has ever made an independent* de novo *determination of the appropriate amount of the fee based on plaintiffs' actual accomplishments in this litigation.* The Court of Appeals nevertheless declared:

> Because the award was based on several factors, only one of which was whether Janowski was the prevailing party, nothing in our decision requires recomputation of the amount awarded. [App. 18a]

Judge Fairchild disagreed with this portion of the decision, observing that the "implied accrual formula, dealt with in Part III of this court's opinion, appears to be the most significant victory of the class members before the district court, and we are reversing that part of the decision." (App. 20a). The District Court's opinion confirms that the benefit to the class resulting from the liability holding on this issue weighed heavily in the decision to utilize a multiplier of 2, see App. 44a, quoted at p. 7, *supra*. Thus, the Court of Appeals was simply wrong when it assumed that the District Court's award would have been the same if the trial judge had not erroneously held in plaintiffs' favor on the "implied accrual" and two other liability issues.

Moreover, the Court of Appeals made a fundamental error by taking it on itself to determine the amount of the award although it had in large part reversed the District Court on the merits. Because such calculations have long been regarded as being discretionary with the district court in the first instance [19] (subject of course to "sound legal principles" (cf. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416, quoting *United States v. Burr*,

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[19] *Trustees v. Greenough*, 105 U.S. 527, 537.

25 F. Cas. 30, 35 (CC Va. 1807)) the Court of Appeals should have remanded the case to the District Court for recalculation of the fee.

Under parallel circumstances, this Court recently held:

> When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings * * *
>
> Likewise, where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue. *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 331-332. All of this is elementary. [*Pullman-Standard Co. v. Swint*, —— U.S. ——, 50 L.W. 4425, 4430, (decided April 27, 1982).]

So, too, where the district court has made a discretionary determination which is its responsibility in the first instance, and that determination is infirm because of a legally erroneous view of liability, "a remand is the proper course unless the record permits only one resolution of the [discretionary issue]". This point was ably articulated in *Oser v. Wilcox*, 338 F.2d 886, 893 (C.A. 9);[20] the court's reference therein to Justice Frankfurter's discussion in the first *Chenery* case is particularly apposite since in a context like the present the appellate court is exercising a function more closely akin to its

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[20] The *Oser* Court said:

> Since the district court has not, in the exercise of its discretion, determined that there is a probability that there is no reasonable possibility that plaintiff can prevail on the merits the order requiring security for costs cannot rest on that ground. Where an exercise of discretion properly goes into a trial court determination of whether to grant or deny particular relief, the grounds upon which the order is based are those upon which it must be judged. Cf., S.E.C. v. Chenery Corp., 318 U.S. 80, 88, 93-94. [338 F.2d at 893, footnote omit ed.]

review of discretionary determinations of an administrative agency than of rulings of law of a lower court.

2. If the Court of Appeals had remanded the case to the District Court for reconsideration of the fee award that court would in all likelihood have reduced or eliminated the multiplier in reevaluating the fee. Nor should the Court of Apepals have appointed the multiplier portion of the District Court's analysis even on that court's erroneous liability premise. This, too, raises an issue warranting this Court's consideration, because the use of multipliers is inherently arbitrary and though approved by several courts, has been firmly disapproved by one Court of Appeals. In *Oliver v. Kalamazoo Bd. of Ed.*, 576 F.2d 714 (C.A. 6) the court found "that the district court abused its discretion in employing the multiplier [of two] to increase the attorneys' fee award," because it "was without statutory authority."[21] The *Oliver* Court added:

> Attorneys' fees awards should be high enough to attract competent counsel yet not so high as to provide a windfall for them. Multiplying the number of hours properly spent times a reasonable hourly rate is sufficient to serve this goal. [*Id.* at 715-716][22]

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[21] The applicable statute in *Oliver*, 20 U.S.C. § 617, provides for the recovery of "a reasonable attorney's fee"; the court observed that the same language is found in 42 U.S.C. § 1988. (576 F.2d at 715, n. 5). It is used also in § 502(g) of ERISA.

[22] In the present case, the multiplier was justified by the District Court on the basis of the result achieved (which was substantially diminished by the Court of Appeals) and by the contingency factor. See p. 7, *supra*. The latter factor was also taken into account in calculating the attorneys' fees on the basis of counsel's rates at the time of the award, rather than at the time that the services were performed (and would have been paid for in the absence of a contingency arrangement). (See pp. 6-7, *supra*.) This seems to us to be a reasonable accommodation. But to increase the defendants' liability because the plaintiff and his attorney have a contingency arrangement is unfair to the defendant (particularly in the absence of willful wrongdoing) and paradoxical. See *Prandini v. National Tea Co.*, 557 F.2d 1015, 1020 (C.A. 3).

3. Finally, we submit that the Court of Appeals should have firmly disapproved the District Court's analysis insofar as that court gave any weight to the size of the pension fund's assets of $222,500,000, and their increase of more than $27,000,000 in the prior fiscal year (App. 45a). Even if relevant in determining the amount of the fee to be awarded this description would be grossly misleading, for it disregards the actuarial liabilities of the fund. But of course, the size of a pension fund's assets should be held irrelevant in determining the amount of its liability for attorneys' fees.[24] In § 2(a) of ERISA, 29 U.S.C. § 1001(a), Congress found, *inter alia*, "that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered" (See *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 374-375.) The Congressional policy promoting the solvency of plans can only be undermined if such plans are penalized for their responsibility and soundness by increasing their vulnerability to large fee awards, and inevitably to speculative litigation.

Lastly, there is an overriding objection to imposing a heavy attorneys' fee award on a defendant because it "would be a relatively small burden" compared to the defendants' assets or unrelated legal expenses (App. 45a). As was said in an analogous context in *Copeland v. Marshall, supra:*

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[24] Some courts regard the fees spent by the defendants to be a useful guide in evaluating the reasonableness of the award to the plaintiffs. But no such application of Newton's third law of motion can justify the District Court's adversion to the fact that "the fund itself paid $1,158,861 in attorney fees for fiscal year ending January 31, 1980" (App. 45a). For plaintiffs themselves, in submitting these figures to the District Court, observed that the major portion thereof was for services in a major sale of real estate, and of course there is a substantial and continuous need for attorneys' services in the administration of a pension fund.

> In sum, we agree with the panel opinions that the government has a "deep pocket" and that any fee request should be examined with care. But we think, for the reasons stated above, that fees should be neither lower, nor calculated differently, when the losing defendant is the government. [641 F.2d at 896 (C.A. D.C. en banc)]

The same equitable principle should govern in suits against private parties. In calculating fee awards the courts should not be in the business of redistributing wealth. Once it is determined that the party to be charged with fees is capable paying them without undue hardship, the amount of the obligation should not be increased over what is reasonable because that party is able to afford more.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CLERK

No. 82-151

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL NO. 710 PENSION FUND, ET AL.,
Petitioners,

v.

WILLIAM R. JANOWSKI, ET AL.,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

		Page
Appendix A	(Opinion of the United States Court of Appeals for the Seventh Circuit)	1a
Appendix B	(Judgment of the United States Court of Appeals for the Seventh Circuit)	21a
Appendix C	(Order of the United States Court of Appeals for the Seventh Circuit denying rehearing)	23a
Appendix D	(Decision of the United States District Court for the Northern District of Illinois on Class Action)	25a
Appendix E	(Decision of the United States District Court for the Northern District of Illinois on Cross-Motions for Summary Judgment on the Amended Complaint)..	29a
Appendix F	(Order of the United States District Court for the Northern District of Illinois on Cross-Motions for Summary Judgment)	37a
Appendix G	(Decision of the United States District Court for the Northern District of Illinois on Attorneys' Fees)	40a
Appendix H	(Order of the United States District Court for the Northern District of Illinois on Attorneys' Fees)	48a
Appendix I	(Order Extending Time to File Petition for Writ of Certiorari (Stevens, J.))	50a

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 81-1340 & 81-1359

WILLIAM R. JANOWSKI and ROBERT H. BARNHISEL, individually and on behalf of all others similarly situated,
Plaintiffs-Appellees,
Cross-Appellants,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL NO. 710 PENSION FUND, WILLIAM D. JOYCE, JOHN D. KELAHAN, ANTHONY CURCIO, ROBERT J. BAKER, JOHN H. BARRANCO and ROY M. PRIDE,
Defendants-Appellants,
Cross-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 78 C 841—Thomas R. McMillen, *Judge*

ARGUED SEPTEMBER 28, 1981—DECIDED MARCH 8, 1982

Before BAUER, *Circuit Judge*, FAIRCHILD, *Senior Circuit Judge*, and BROWN, *Senior District Judge.**

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* The Honorable Wesley E. Brown, Senior Judge of the United States District Court for the District of Kansas, is sitting by designation.

BAUER, *Circuit Judge.* The issue in this appeal is whether the International Brotherhood of Teamsters Local No. 710 Pension Fund (the Fund or Plan) as amended complies with the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.* Two Plan participants, William R. Janowski and Robert H. Barnhisel (collectively Janowski), initiated this action alleging that the amendments deprived them of benefits which vested before ERISA became effective. The suit ultimately proceeded as a class action on behalf of all pre-ERISA participants of the Fund whose early retirement benefits were, or might be, affected by the amendments.

The district court approved some of the amendments and disapproved others. It held that the designation of 65 as the normal retirement age under the amended Plan was permissible. It found, however, that the methods adopted for calculating accrued benefits for pre-ERISA service, for part-time service, and for certain early retirement and vested retirement benefits were improper. It also found that the initial Summary Plan Description Booklet distributed to Plan participants explaining the revisions did not clearly advise them of the option to elect benefits under either the old or the new Plan, whichever was greater. For these reasons, the district court entered a permanent injunction enjoining the trustees of the Fund from revoking the option of any participant who entered covered employment before July 1, 1976, to choose benefits under the prior Plan. It also awarded plaintiffs attorneys' fees in the amount of $142,485.00. Both sides have appealed. We affirm in part and reverse in part.

Each party assigns numerous errors. The trustees allege that plaintiffs may not bring this suit either as individuals or as class representatives. They attack the district court's finding that there was an implied accrual of benefits in the original Plan which had to be

reflected in the formula adopted for computing pre-ERISA service credit and assert that the formula chosen to provide accrued benefits for part-time employees complies with the statute because it is both ratable and reasonable, as required by 29 U.S.C. § 1054(b)(3)(B). The trustees also maintain that they did not reduce any vested benefits available under the prior Plan as set forth in the July 1979 Summary Plan Description Booklet because participants enrolled in the pre-ERISA Plan may elect to receive the benefits under either Plan. Therefore, they argue that the injunction preserving this option was unwarranted. Finally, the trustees assert that the award of attorneys' fees is improper because the litigation has failed to benefit the entire class of Fund participants and has not added to the Fund's assets.

In contrast, Janowski maintains that 57 should have been designated as the normal retirement age because that was the normal retirement age under the prior Plan. He contends that the change from 57 to 65 deprives Fund participants of vested rights to: (1) reasonable actuarial reductions for benefits beginning before 57; (2) benefits beginning at 57 instead of 65; and (3) pre-retirement benefits between 47 and 57. Additionally, Janowski contends that if the class prevails on the issue of the normal retirement age the amount of the fee award should be increased to reflect this fact.

I

Initially, the trustees challenge Janowski's right to bring this action on several grounds and urge dismissal for lack of subject matter jurisdiction. They argue that this case is not ripe because no pre-ERISA Plan participant has applied for and been denied any benefits. The trustees maintain that the named plaintiffs cannot allege any concrete injury because they are not yet ready to retire and have never applied for early retirement benefits and that they do not have a common in-

terest with the entire class of Fund participants. Additionally, the trustees allege that the exhaustion doctrine is applicable to ERISA actions and assert that Janowski has failed to pursue his administrative remedies.

The trustees' contention that the exhaustion doctrine applies to ERISA actions is persuasive. Although section 1132 provides that a civil action may be brought by a participant "to clarify his rights to future benefits under the terms of the plan," 29 U.S.C. § 1132, it is silent as to whether exhaustion is a prerequisite for exercising this statutory right. While this issue has not yet been considered by this court, the Ninth Circuit has held that "sound policy requires the application of the exhaustion doctrine in suits under the Act." *Amato v. Bernard*, 618 F.2d 559, 567 (9th Cir. 1980).

Assuming *arguendo* that the exhaustion doctrine should be applied to ERISA cases, the doctrine is not absolute, *White Mountain Broadcasting Co., Inc. v. FCC*, 508 F.2d 274 (D.C. Cir.), *cert. denied*, 444 U.S. 963 (1979), and unless statutorily mandated, its application is committed to the sound discretion of the court. *Aleknagik Natives Ltd. v. Andrus*, 648 F.2d 496 (9th Cir. 1980). Where exhaustion is not specifically required by the statute, the district court's discretionary decision may only be disturbed on appeal when there has been a clear abuse of discretion. *Medina v. Castillo*, 627 F.2d 972 (9th Cir. 1980).

Exhaustion has no relevance here, for the doctrine is only appropriate where it is necessary to develop a full factual record or to take advantage of agency expertise. *Aleknagik Natives Ltd. v. Andrus*, 648 F.2d 496 (9th Cir. 1980). Thus, the exhaustion doctrine has been applied in ERISA cases only in situations where an individual has applied for and been denied current benefits. In contrast, this case concerns clarification of the right of an entire class to future benefits. This issue is solely a ques-

tion of statutory interpretation and does not require a factual record. *See McKart v. United States*, 395 U.S. 185, 197-99 (1968); *Frontier Airlines v. CAB*, 621 F.2d 369 (10th Cir. 1980). Since the reasons for the doctrine are not present, the district court did not abuse its discretion in waiving the exhaustion requirement.

We reject the trustees' contention that this case is a "battle of hypotheticals, a classic example of the difficulty of deciding a case concerning a complex, technical subject without the benefit of specific facts." Defendants-Appellants, Cross-Appellees' br. at 35. Janowski seeks a determination of the nature and scope of Plan participants' rights to future benefits. Section 1132 provides that a civil action may be brought "by a participant . . . to clarify his rights to future benefits under the terms of the plan . . . ." 29 U.S.C. § 1132. This action is precisely the type of action contemplated by the statute.

Lastly, the trustees' argument that the named plaintiffs are inadequate class representatives because they have no common interest with all Fund participants ignores the fact that the class which Janowski purports to represent, and which the trial court certified, includes only "[a]ll persons who are now, or who were as of February 1, 1976, members of Local 710 of the International Brotherhood of Teamsters and who have accepted early retirement or intend to do so under the terms of the Pension Plan of said Local 710 and whose early retirement benefits were or will be affected by the amendments to the Plan made as of February 1, 1976." The named plaintiffs certainly have interests in common with this class. The preliminary challenges to the right to bring this action fail.

II

The technical issues and the specific sections involved in this case must be analyzed in light of the scope and spirit of ERISA as a whole. Designed to revamp private

employee pension plans to ensure minimum vesting, funding, and insurance benefits, H.R. No. 1522, 93rd Cong., 1st Sess. *reprinted in* [1974] U.S. Code. Cong. & Ad. News 4639, 4647-48, ERISA is, of necessity, a highly complex and detailed statute. Three administrative agencies, the Internal Revenue Service (IRS), the Department of Labor, and the Pension Benefit Guaranty Corporation, are charged with insuring that employers amend their pension funds to conform to the statute.

The Fund involved here was created in 1955 pursuant to a collective bargaining agreement. It provided for retirement, survivor, disability, and death benefits for which the employer contributed on behalf of its employees. The Plan was amended on April 21, 1976, but was retroactively effective as of February 1, 1976. After the amendments, the Plan was submitted to the IRS and approved. Thereafter, in January 1978, a booklet describing the revisions and reprinting the text of the new Plan was published for Plan participants. The option of participants with pre-ERISA service to take early retirement benefits under the prior Plan did not appear in either the text of the Plan or the Plan description. These omissions were corrected in the revised booklet, distributed in July 1979, where the option was included in the text of the Plan and the Plan description.

Under the prior Plan a participant was entitled to benefits on the normal retirement date, the date on which the participant reached age 57 and had accumulated 20 years of credited service. The amended Plan retained the right to receive benefits at age 57 with 20 years of service but changed the designation from normal retirement to regular retirement and, pursuant to 29 U.S.C. § 1002(24) and 26 U.S.C. § 411(a)(8),[1] adopted

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[1] Both 29 U.S.C. § 1002(24) and 26 U.S.C. § 411(a)(8) define normal retirement age as:

a new normal retirement age of 65, applicable to participants who were not enrolled in the pre-ERISA Plan.

Since calculations of vesting and accrued benefits are based on the normal retirement age, the age designation significantly affects the amount of benefits the participant receives. Section 411(a)(8) defines normal retirement age as the earlier of: (A) the time a Plan participant attains normal retirement age under the Plan or (B) the later of the time a Plan participant attains 65 or accumulates 10 years of credited service. 26 U.S.C. § 411(a)(8). Janowski argues that subsection (A) mandates that the normal retirement age remain the same in the amended Plan as it was in the prior Plan. In contrast, the trustees read section 411(a)(8) to permit them to designate any age as the normal retirement age, subject to the limitation that it cannot be later than the date a participant attains age 65 unless the participant has not accumulated 10 years of credited service, in which case the participant reaches normal retirement age after 10 years of credited service. The trustees concede that participants in the pre-ERISA Plan have a right to benefits at age 57 after 20 years of credited service but emphasize that the right has been incorporated into the new Plan under the designation regular retirement. They assert that nothing in section 411(a)(8) requires that they designate an age less than 65 as the normal retirement age for participants who were not enrolled in the pre-ERISA Plan.

Initially, we note that § 411(a)(8) has not yet been judicially interpreted. Therefore, in construing the section we are guided by the plain meaning of the language,

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(A) the time a plan participant attains normal retirement age under the plan, or

(B) the later of—

(i) the time a plan participant attains age 65, or

(ii) the 10th anniversary of the time a plan participant commenced participation in the plan.

Atchison, T. & S.F. Ry. Co. v. United States, 617 F.2d 485 (7th Cir. 1980), as well as Congressional intent. The legislative history to § 411(a)(8) indicates that in fashioning minimal requirements for private pension funds, Congress intended to increase the number of individuals participating in retirement plans, H.R. No. 93-807, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4671, while at the same time promoting the financial integrity of those plans. H.R. No. 93-533, 93rd Cong., 1st Sess. *reprinted in* [1974] U.S. Code Cong. & Ad. News 4652. Analyzing § 411(a)(8) in this light, it is clear that Congress intended the trustees, as fiduciaries, to balance desired benefits against economic realities. For this reason, the statute authorized any normal retirement age subject to the limitations of 65 years or 10 years of service. Under § 411(a)(8) the trustees certainly could have established a normal retirement age of less than 65; the statutory language, however, in no way requires them to do so.

Congress was aware that ERISA would require private pension funds to be substantially amended to conform to ERISA. Had it intended the normal retirement age to be the same age as that under the prior Plan it undoubtedly would have so provided. Obviously, the required amendments were costly and Congress wisely committed the task of balancing eligibility standards and benefit levels against the ability of the plans to pay. We agree that age 65 was permissibly chosen as the normal retirement age under the new Plan.

Janowski makes much of the fact that the normal retirement age was not redesignated until April 21, 1976. Citing no authority in support, he argues that in order to change the normal retirement age from 57 to 65 the trustees would have had to make the change before February 1, 1976, the date on which the ERISA reforms were incorporated into the prior Plan. Plaintiffs-Appellees, Cross-Appellants reply br. at 2. In rebuttal

the trustees contend that Janowski's timeliness argument may not be considered because it was raised for the first time on appeal and, alternatively, argue that the date on which the normal retirement age was redesignated is of no significance.

It is axiomatic that generally we may not review issues raised for the first time on appeal. *Houser v. General Motors Corp.*, 595 F.2d 366, 371 (7th Cir. 1979). We need not decide the timeliness issue, however, for assuming *arguendo* that the issue was preserved, it fails. In oral argument Janowski conceded that under ERISA the trustees could have changed the retirement age to 65 had they done so before February 1, 1976. Janowski interprets the word "plan" in the phrase "normal retirement age under the plan," 29 U.S.C. § 1002(24), 26 U.S.C. § 411(a)(8), to refer to the pre-ERISA Plan. He strenuously argues that, since 65 was not the normal retirement age under the pre-ERISA Plan or on the day the ERISA reforms became effective, the trustees had no authority to alter this age.

We do not read the word "plan" to have the restrictive definition Janowski urges. Nothing in the statutory language implies that the normal retirement age must be the age designated under the earlier Plan. In fact, § 411 makes no reference to any pre-ERISA provision. It merely states that a normal retirement age be specified and provides that this age may be lower than 65 but not greater than 65, provided that at 65 the participant has accumulated 10 years of credited service. The trustees did all that the statute required by specifying an age not greater than 65. We do not agree with Janowski that the date on which the pre-ERISA plan was revised to comply with the statute is significant. The statute did not require pre-ERISA plans to be amended on the date it became effective. Thus, pre-ERISA benefits accrued under the prior Plan until February 1, 1976; pre-ERISA benefits could not accrue after ERISA became

effective. Since the trustees concededly had the right to change the retirement age to 65 on February 1, 1976, they also had the right to make this change on April 21, making it retroactively effective as of February 1, 1976.

III

The next consideration is whether the amended Plan incorporated a proper method for computing accrued benefits during pre-ERISA years. The statute [2] sets forth two formulas to be applied to pre-ERISA years. Subsection (i) provides that accrued benefits shall be determined "under the plan, as in effect from time to time prior to September 2, 1974." This subsection is triggered whenever a prior plan contained an accrued benefit formula. Subsection (ii) provides the formula to be applied if the old plan had no accrued benefit formula.

It is undisputed that the prior Plan did not specify a formula. However, relying on the fact that the prior Plan provided for a full benefit of $450 per month for persons retiring at age 57 after 20 years of qualified service, the district court reasoned that 1/20th of the benefits implicitly accrued in each of the 20 years of qualified service. We reject the concept of implied accrual of benefits, for had Congress intended that a formula based on required years of service be implied whenever a plan did not specify one, subsection (ii) would be

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[2] 29 U.S.C. § 1054(b)(1)(D) in part provides:

> [A] defined benefit plan satisfies the requirements of this subparagraph with respect to such years of participation only if the accrued benefit of any participant with respect to such years of participation is not less than the greater of—
>
> (i) his accrued benefit determined under the plan, as in effect from time to time prior to September 2, 1974, or
>
> (ii) an accrued benefit which is not less than one-half of the accrued benefit to which such participant would have been entitled if subparagraph (A), (B), or (C) applied with respect to such years of participation.

superfluous. Since statutes should be construed so as to give effect to all their parts. *People v. Consolidated Rail Corp.*, 589 F.2d 1327 (1978), *cert. denied*, 442 U.S. 942 (1979), and since there was no accrued benefit formula in the prior Plan, subsection (ii) should have been applied.

IV

We next consider whether the amended Plan provides appropriate accrual for part-time service. Under section 4.04 of the amended Plan, employees who work less than 20 weeks receive no accrued credit, employees who work between 20 and 35 weeks receive one-half year credit, and employees who work more than 35 weeks receive a full year's credit. The district court concluded that this "rough allocation" of credit was contrary to 26 U.S.C. § 411(b)(3)(B)[3] because it was too imprecise. In reaching its decision that the allocation was not sufficiently ratable, the district court relied on two of the examples set forth in the regulation implementing § 411(b)(3)(B), 29 C.F.R. § 2530.2042(c)(4).[4] These two examples con-

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[3] 26 U.S.C. § 411(b)(3)(B) provides:

> Less than full time service.—For purposes of this paragraph, except as provided in subparagraph (C), in the case of any employee whose customary employment is less than full time, the calculation of such employee's service on any basis which provides less than a ratable portion of the accrued benefit to which he would be entitled under the plan if his customary employment were full time shall not be treated as made on any reasonable and consistent basis.

[4] 29 C.F.R. § 2530.204-2(c)(4) sets forth examples of acceptable credit allocations:

> *Examples.* The following are examples of reasonable and consistent methods for crediting partial years of participation:
>
> (i) A plan requires 2,000 hours of service for a full year of participation. An employee who is credited during a computation period with no less than 1,000 hours of service but less than 2,000 hours of service is credited with a partial year of participation equal to a portion of a full year of participa-

tained computations which more accurately credit a part-time employee for the specific amount of time worked.

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tion determined by dividing the number of hours of service credited to the employee by 2,000.

(ii) A plan requires 2,000 hours of service for a full year of participation. The plan credits service in an accrual computation period in accordance with the following table:

Hours of service credited	Percentage of full year of participation credited
1000	50
1001 to 1200	60
1201 to 1400	70
1401 to 1600	80
1601 to 1800	90
1801 and above	100

Under this method of crediting partial years of participation, each employee who is credited with not less than 1,000 hours of service is credited with at least a ratable portion of a full year of participation.

(iii) A plan provides that each employee who is credited with at least 1,000 hours of service in an accrual computation period must receive credit for at least a partial year of participation for that computation period. For full accrual, however, the plan requires that an employee must be credited with a specific number of hours worked; employees who meet the 1,000 hours of service requirement but who are not credited with the specified number of hours worked required for a full year of participation are credited with a partial year of participation on a prorata basis. For example, if the plan requires 1,500 hours worked for full accrual, an employee with 1,500 hours worked would be credited with full accrual, but an employee with 1,000 hours worked and 500 other hours of service would be credited with 2/3 of full accrual. The plan's method of crediting service for accrual purposes is consistent with the requirements of this paragraph. It should be noted, however, that use of hours worked as a basis for prorating benefit accrual may result in discrimination prohibited under section 401(a)(4) of the Code.

(iv) Employee A is employed on June 1, 1980 in service covered by a plan with a calendar year accrual computation

The trustees argue that the district court erred by treating these examples as regulations. They emphasize that the statute does not provide a formula for prorating credit but simply requires that the partial year crediting be reasonable and ratable. The trustees contend that the amended Plan fulfills these limitations. Hence, they insist that the district court had no authority to interfere with their discretion by imposing its own notion of reasonableness to require a more precise allocation than contemplated by the statute or the regulations.

Trustees' position fails. Under formula adopted by the trustees, employees who have worked 21 weeks receive the same credit as those who work 34 weeks. For employees who work more than 21 weeks, the allocation is neither reasonable nor ratable. Janowski has propounded a method of computation whereby employees who work between 21 and 34 weeks would fall within one of the six groups, each group receiving increased credit for time worked on a percentage basis up to 35 weeks, at which point credit for the entire year would be given. Under his proposed amendment, an employee who works 20 but less than 21 weeks would receive .5 year credit, an employee who works 21 but less than 24 weeks would receive .6 year credit, an employee who works 24 but less than 28 weeks would receive .7 year credit, an employee who works 28 but less than 31 weeks would receive .8 year credit, an employee who works 31 weeks but less than 35 weeks would receive .9 year credit, and an em-

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period, and which requires 1,800 hours of service for a full accrual. Employee A completes 500 hours from June 1, 1980 to December 31, 1980, and completes 100 hours per month in each month during 1981. A is admitted to participation on July 1, 1981. A is credited with 1,200 hours of service for the accrual computation period beginning January 1, 1981. Under the rules set forth in paragraph (c)(3) of this section, A is required to be credited with not less than one-third of a full accrual (600 hours divided by 1,800 hours).

ployee who works 35 weeks or more would receive a full year's credit. This proposed Plan amendment satisfies the statute and should be incorporated into the amended Plan.

V

With respect to early retirement benefits or deferred benefits it is undisputed that any participant enrolled in the original Plan retains the choice to receive either the new Plan's "formula" benefit or the prior Plan's "scheduled" benefit, whichever is greater. The trustees maintain that because this fact is undisputed and clearly set forth in the July 1979 Summary Plan Booklet, the entry of an injunction preserving this option is unnecessary and inappropriate.

As required by Fed. R. Civ. P. 65(d), the district court set forth its reasons for issuing the permanent injunction. It found that injunctive relief was appropriate for two reasons: (1) the improper schedule set forth in the 1978 Plan description booklet could be readopted by the trustees and (2) retroactivity of the amendment in the July 1979 booklet was not clearly specified.

We cannot agree. In determining whether to issue a permanent injunction the likelihood of future violations must be viewed in light of past conduct. *SEC v. Resch-Cassin & Co., Inc.*, 362 F. Supp. 964 (S.D.N.Y 1973). We are also mindful that injunctive relief is not appropriate to prevent the possible occurrence of an event at some indefinite future time. *Interco Inc. v. FTC*, 478 F. Supp. 103 (D.D.C. 1979). In this case no participant has been refused prior Plan "scheduled benefits," nor is there any evidence indicating that the trustees will revoke this option. The trustees have consistently stated that the option to receive benefits under the Plan was available to participants enrolled in the Plan before ERISA became effective. Indeed, although the trustees omitted the prior Plan's schedule of benefits in the January 1978 Summary Plan Description Booklet, this

omission was corrected in the following year's booklet, which clearly states that "those Participants who enter Covered Employment prior to July 1, 1976 shall have the option of receiving the amount of the Early Retirement Pension as determined in Section 3.08[a] [of the amended Plan] or the monthly amount of Early Retirement Pension according to the following Schedule [computed according to the prior Plan]." July 1979 Pension Plan & Summary Plan Description at 72. Therefore, there is no reason to conclude that the trustees will attempt to revoke the option or deny a participant benefits rightfully due. If a participant is, in the future, improperly denied benefits, an action can be brought at that time and an award of damages can be fashioned which will adequately compensate for any loss. *Banks v. Trainor*, 525 F.2d 837 (7th Cir. 1975), *cert. denied*, 424 U.S. 978 (1976). Accordingly, the injunction should not have been entered.

VI

Lastly, we consider whether the award of attorneys' fees was proper. The trial court ordered the Fund to pay $142,485.00 in attorneys' fees for several reasons: (1) fees and expenses are authorized by the statute, (2) the class prevailed on all but one major issue, and (3) the litigation obtained a financial benefit for many members of the class. The trustees do not dispute that an award of attorneys' fees may be appropriate in some ERISA actions, but, relying on *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 109-11 (3d Cir. 1976), argue that an award of attorneys' fees is inappropriate where, as here, the litigation involves competing interests in a common fund. They contend that there has been no net benefit to the entire class of Fund participants as the result of the litigation. Again, relying on *Lindy Brothers*, they maintain that where there is no benefit to the Fund, fees may not be awarded. Further, they stress that Janowski

did not prevail on the normal retirement age which, they contend, is the principal issue.

It is well-settled that the standard of review of trial court awards of attorneys' fees is abuse of discretion and that "[a]n abuse of discretion is found only when there is a definite conviction that the court made a clear error of judgment in its conclusion upon weighing relevant factors." *Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446, 452 (9th Cir. 1980). It is equally well-settled that in determining whether an award of attorneys' fees in suits brought under ERISA is appropriate, courts have considered the following factors: (1) the degree of the offending parties' culpability or bad faith; (2) the degree of the ability of the offending parties to satisfy personally an award of attorneys' fees; (3) whether or not an award of attorneys' fees against the offending parties would deter other persons acting under similar circumstances; (4) the amount of benefit conferred on members of the pension plan as a whole; and (5) the relative merits of the parties' positions. *Iron Workers Local 272 v. Bowen*, 624 F.2d 1255 (5th Cir. 1980); *Eaves v. Penn*, 587 F.2d 453 (10th Cir. 1978).

Unfortunately, the district court did not justify its decision to award attorneys' fees in terms of these specific guidelines, which would have been helpful in reviewing its decision for abuse of discretion. However, while a fuller explanation of its reasoning would have been helpful, there is sufficient analysis in the district court's decision to permit review. The district court primarily based its award on the fact that Janowski, although not wholly successful, generally prevailed on the merits, thereby preventing retirees under this and other employee pension funds from being underpaid. It also noted that although the trustees did not act in bad faith or with the intent to deprive, they failed to cooperate with Janowski in complying with at least one court

order [5] and by their dereliction may have contributed to an additional expenditure of time by Janowski's attorneys. Further, distinguishing *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102 (3d Cir. 1976), the district court recognized that the fees would not be paid out of a fund which could be recovered from the trustees and balanced this factor against the fact that the Plan's assets had significantly increased over paid benefits and that the fee award was a small factor of the total fees paid to the Fund's attorneys in the previous fiscal year. Only the factor of whether or not an award of attorneys' fees against the offending party would deter other persons acting under similar circumstances was not specifically addressed.

Fee provisions are designed as an enforcement incentive to insure that aggrieved parties who are unable to pay their own attorneys' fees are not denied access to the courts. In situations where aggrieved parties are suing as "private attorneys general," advancing a public interest, the award of attorneys' fees and costs generally has been automatic, unless special circumstances rendered the award unjust. Thus, the discretionary fee provisions in the civil rights statutes are considered virtually mandatory. The award of fees as an enforcement incentive is not as great, however, in an ERISA action for two reasons. First, fiduciaries have a statutory obligation to insure that plans are properly administered. 29 U.S.C. § 1105. Second, while plan participants may be suing for the benefit of all beneficiaries of a particular fund, they may also be suing merely on their own behalf.

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[5] On July 24, 1980, the district court ordered the trustees to cooperate with plaintiffs in reaching a declaratory judgment which had, up to that point, been agreed upon in form only and in drafting the necessary amendments to the Plan. The trustees refused to comply with this order, thereby necessitating an additional expenditure of time by plaintiff's attorneys.

Accordingly, it is clear that the policies reflected in ERISA, statutorily authorized award of fees is not so compelling that the discretionary provision should be construed as virtually mandatory. *Iron Workers Local 272 v. Bowen*, 624 F.2d 1255, 1265 (5th Cir. 1980). Nevertheless, we believe that this award is justified because the litigation benefitted a substantial group of Fund participants and that the award is necessary to enable aggrieved parties to invoke the power of the court when pre-ERISA benefits are in danger. The award of fees is not an abuse of discretion.

Finally, we consider the amount of the award. The district court carefully and thoroughly analyzed the complexity and unsettled nature of the questions involved, the expertise of the attorneys, and the time expended to arrive at the hourly rate of $100 and $125 and the multiplier of two. We adopt the district court's analysis and conclusion with respect to the amount awarded and, as a consequence, need not repeat it. Because the award was based on several factors, only one of which was whether Janowski was the prevailing party, nothing in our decision requires recomputation of the amount awarded.

The district court's decision is affirmed with respect to exhaustion, ripeness, class representation, normal retirement age and credit for part-time benefits. The district court's opinion is reversed with respect to calculation of accrued benefits and the entry of a permanent injunction is vacated. Each party is to bear its own appeal costs. Accordingly, the district court's decision is

AFFIRMED IN PART and REVERSED IN PART.

FAIRCHILD, *Senior Circuit Judge*, dissenting in part. I agree that the Plan formula for calculating credits for a part-time employee does not comply with Sec. 411(b)(3)(B).

A Plan need not, under subparagraph (C), provide for credit for a part-time employee with less than 1,000 hours (about 22 weeks) of service during a year.[1] For service beyond that, subparagraph (B) requires that the formula provide not less than a ratable portion of the accrued benefit for full-time employment.

This Plan does not define full-time employment. Even if it specified 52 weeks, however, its formula for part-time service would provide less than a ratable portion for persons with more than 26 weeks but less than 35 weeks of service. One with 27 to 34 weeks of service would have to receive more than the one-half year's credit allowed by the Plan in order to get a portion "not less than ratable."

In its present form, the Plan may be construed as defining full-time employment as 35 weeks, since it awards full credit at that point. If 35 weeks be deemed full-time employment, it would follow that, however detailed the steps in the formula, one with 22 weeks of service must receive at least 22/35ths of one year's credit, one with 25 weeks must receive at least 5/7ths, and one with 30 weeks must receive at least 6/7ths.

It is clear that the Plan must be modified, but I do not agree that the court should specify any particular complying formula. I note, moreover, that there are instances where the formula set forth in Part IV of the majority opinion fails to provide not less than a ratable portion unless full-time employment be defined as at least 39 weeks, e.g., if 23 be divided by any number less than 39, the quotient exceeds .6.

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[1] Under 29 C.F.R. § 2530.200b-3(e)(1)(ii), each week of employment is the equivalent of 45 hours of service.

I am also of the opinion that the allowance of attorneys' fees should be reduced. The implied accrual formula, dealt with in Part III of this court's opinion, appears to be the most significant victory of the class members before the district court, and we are reversing that part of the decision.

Except for the foregoing, I concur.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

Opinion by Judge Bauer
Judge Fairchild *concurring in part, dissenting in part.*

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Corrected March 30, 1982

March 8, 1982

Before

HON. WILLIAM J. BAUER, *Circuit Judge*

HON. THOMAS E. FAIRCHILD, *Senior Circuit Judge*

HON. WESLEY E. BROWN, *Senior District Judge* *

Nos. 81-1340 and 81-1359

WILLIAM R. JANOWSKI and ROBERT H. BARNHISEL, individually and on behalf of all others similarly situated,
Plaintiffs-Appellees,
Cross-Appellants,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL NO. 710 PENSION FUND, WILLIAM D. JOYCE, JOHN D. KELAHAN, ANTHONY CURCIO, ROBERT J. BAKER, JOHN H. BARRANCO and ROY M. PRIDE,
Defendants-Appellants,
Cross-Appellees

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* The Honorable Wesley E. Brown, Senior Judge of the United States District Court for the District of Kansas, is sitting by designation.

Appeals from the United States District Court
for the Northern District of Illinois
Eastern Division

No. 78-C-841—Judge Thomas R. McMillen

JUDGMENT—ORAL ARGUMENT

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED in part and REVERSED in part, in accordance with the opinion of this Court filed this date. Each party is to bear its own costs on appeal.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

April 7, 1982

Before

HON. WILLIAM J. BAUER, *Circuit Judge*

HON. THOMAS E. FAIRCHILD, *Senior Circuit Judge*

HON. WESLEY E. BROWN, *Senior District Judge* *

Nos. 81-1340 and 81-1359

WILLIAM R. JANOWSKI and ROBERT H. BARNHISEL, individually and on behalf of all others similarly situated,
Plaintiffs-Appellees,
Cross-Appellants,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL NO. 710 PENSION FUND, WILLIAM D. JOYCE, JOHN D. KELAHAN, ANTHONY CURCIO, ROBERT J. BAKER, JOHN H. BARRANCO and ROY M. PRIDE,
Defendants-Appellants,
Cross-Appellees

Appeal from the United States District Court
for the Northern District of Illinois
Eastern Division

No. 78-C-841—Thomas R. McMillen

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* The Honorable Wesley E. Brown, Senior Judge of the United States District Court for the District of Kansas, is sitting by designation.

ORDER

On consideration of the petitions for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by both Plaintiffs-Appellees, Cross-Appellants William R. Janowski, et al., and by Defendants-Appellants, Cross-Appellees International Brotherhood of Teamsters Local 710 Pension Fund, et al., no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

It is ordered that the aforesaid petitions for rehearing be, and the same are hereby, DENIED.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 78 C 841

WILLIAM R. JANOWSKI and ROBERT H. BARNHISEL,
Plaintiffs,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL NO. 710 PENSION FUND, *et al.*,
Defendants.

DECISION ON CLASS ACTION

Plaintiffs have now filed a motion to certify a class under F.R.C.P. 23(b)(1) or (2) as follows:

> All persons who are now, or who were as of February 1, 1976, members of Local No. 710 of the International Brotherhood of Teamsters and who have accrued benefits subject to the terms of the Pension Plan of said local as amended effective February 1, 1976.

Defendants resist the certification on various grounds. At the present time, we believe that a modified class is proper for certification under Rule 23(b)(1).

The complaint is filed under E.R.I.S.A. and alleges that the defendant trustees amended the early retirement provisions of their pension plan on February 1, 1976 in violation of their fiduciary duties. Defendants have filed an answer denying most of the substantive allegations of the complaint and raising certain affirmative defenses, but these defenses have not been motioned up for a decision and we therefore find that the question of class certification is timely.

There is no substantial question that the class action device is available under E.R.I.S.A., contrary to defendants' contentions. Since Union benefit funds ordinarily affect a large number of persons, a class action is peculiarly applicable to resolve questions involving the benefits payable under such funds. Congress did not specifically exclude E.R.I.S.A. from the operation of Rule 23, and we find and conclude that it does apply. *Robinson* v. *United Mine Workers of America*, 449 F.Supp. 941 (D. D.C. 1978).

Defendants also contend that plaintiffs lack "standing" because they have not yet been damaged by the amendments made on February 1, 1976. However, they are given the right to sue by § 1132(a)(3) of E.R.I.S.A. *See Mulqueeny* v. *National Commission On the Observance of International Women's Year*, 549 F.2d 1115, 1120, n.15 (7th Cir. 1977).

The most troublesome objection to certifying a class is that, if plaintiffs prevail, certain members of the class may be adversely affected. The amendments about which plaintiffs complain concern the age and benefits upon early retirement. Defendants point out that an increase of benefits to early retirees might result in decreasing benefits to those who retire after satisfying the full service and age requirements. However, this is not necessarily so and depends upon actuarial evidence, since plaintiffs contend that the fund is able to satisfy their complaint without disadvantaging others.

This conflict of interest within the class requested by plaintiffs is not one specifically addressed by Rule 23, except by the prerequisite in Rule 23(a)(3) that the claims of the representative parties are typical of the claims of the class. Subsection (4) also requires that the representative parties will "fairly and adequately protect the interests of the class," which plaintiffs cannot do if the class contains members with conflicting or adverse

interests. Nor can the latter persons protect their interests by opting out of the class.

Of course, as plaintiffs point out, the defendant trustees presumably can be relied upon to protect the adverse interests. This was the approach taken in *Dierks* v. *Thompson*, 414 F.2d 453 (1st Cir. 1969). It has a certain practical appeal, assuming that the trustees can effectively represent all of the beneficiaries of the plan. However, inasmuch as some beneficiaries allege that their interests are hostile to those of the trustees, we do not believe the trustees should be put into the position of representing conflicting interests of beneficiaries. Nor does this resolution satisfy the prerequisites of Rule 23 (a) (3) and (4).

We believe a more appropriate solution is to certify the class only for those persons who are adversely affected by the amendments of February 1, 1976, specifically those who desire or have taken early retirement. See *Insley* v. *Joyce*, 330 F.Supp. 1228, 1235 (N.D. Ill. 1971). Granting that the membership of such a class may change as an employee's intention changes, there are at least 44 present retirees who will remain in the class for the balance of their lives, according to defendants' representations. At some future time, a representative of an opposing class might intervene in support of the amendments, although this is hardly necessary if the defendant trustees find no conflict in doing so.

We have considered the other objections of the defendants to certifying a class and find them to be no impediment. Also, since we intend to narrow the class as discussed above, and since the existence of this case is presumably well-known among members of the Union, we find and conclude that the class action can be maintained under Rule 23(b) (2). Plaintiffs seek no monetary relief, hence an injunction or declaratory judgment should ultimately resolve the case.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the following class is certified in the above-entitled cause in accordance with F.R.C.P. 23(b)(2) as follows:

> All persons who are now, or who were as of February 1, 1976 members of Local 710 of the International Brotherhood of Teamsters and who have accepted early retirement or intend to do so under the terms of the Pension Plan of said Local 710 and whose early retirement benefits were or will be affected by the amendments to the Plan made as of February 1, 1976.

Apparently this case can be disposed of on a stipulation of facts or cross-motions for summary judgment, since it seems to involve primarily issues of law and perhaps of accounting. In order to determine future procedures, this case will be called for a status report on Monday, March 12, 1979 at 11:00 a.m.

ENTER:

/s/ Thomas R. McMillen
Judge
U.S. District Court

Dated: February 2, 1979

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 78 C 841

WILLIAM R. JANOWSKI and ROBERT H. BARNHISEL, individually and on behalf of all others similarly situated,
Plaintiffs,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL NO. 710 PENSION FUND, *et al.*,
Defendants.

DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT ON THE AMENDED COMPLAINT

Both parties have filed motions for summary judgment on the Amended Complaint. Plaintiffs brought this action contesting certain amendments to the Local 710 pension plan, effective February 1, 1976. This case has been certified as a class action pursuant to F.R.C.P. 23(b)(2). Plaintiffs contend that the amendments violate the requirements of E.R.I.S.A. and the trustees' fiduciary duties thereunder. The motions raise solely questions of law.

The court rejects defendants' preliminary challenges to plaintiffs' right to bring this action, as well as defendants' suggested standard of review. Plaintiffs' standing to sue as participants in the plan is created by 29 U.S.C. § 1132(a)(3). We also hold that if the plan amendments violate E.R.I.S.A. requirements, then defendants' official actions are arbitrary and capricious as a matter of law. Thus we deal with plaintiffs' contentions *seriatim* on the merits, as follows:

1. *The alteration of the "normal retirement age" from 57 to 65.* The old plan defined an employee's normal retirement date as the date when he attained his 57th birthday or otherwise became eligible for retirement benefits. Under § 1.16 of th new plan, normal retirement age is 65, "or if later," the participant's age on the tenth anniversary of his participation. Thus the normal retirement date under the new plan is the first day of the month following the participant's attainment of "normal retirement age," per § 1.17.

The crucial phrase "normal retirement age" is defined in E.R.I.S.A. at 29 U S.C. § 1002(24) and in the Internal Revenue Code at 26 U.S.C. § 411(a)(8). It is the earlier of

(A) the time a plan participant attains normal retirement age under the plan, or

(B) the later of—

(i) the time a plan participant attains age 65, or

(ii) the tenth anniversary of the time a plan participant commenced participation in the plan.

Defendants contend that the definition in § 1.16 of the new plan is controlling, while plaintiffs contend that "normal retirement age" has acquired a technical meaning under this plan as a whole and that age 57 should be retained.

The above definition permits the plan to fix a normal retirement age, subject to certain limitations. Section 1.16 of the new plan does just that. Accordingly, defendants are correct that age 65 is the normal retirement age under the new plan. See *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197 (1976).

Absent a clearly expressed legislative intention to the contrary, the statutory language must ordinarily be regarded as conclusive. See *Consumer Product Safety Com-*

mission v. *GTE Sylvania*, —— U.S. ——, 48 U.S.L.W. 4658, 4659 (June 9, 1980). The legislative history here confirms, rather than detracts from, defendants' position. The House Ways and Means Committee Report twice declares that a given plan will define the normal retirement age, subject to the statutory limitations. 1974 U.S. Code Cong. & Ad. News 4670, 4687, 4726. The House Conference Report is to the same effect:

> . . . In general, the accrued benefit is to be defined in terms of the benefit payable at normal retirement age. Normal retirement age is generally to be the age specified under the plan. However, it may not be later than age 65 or the tenth anniversary of the time the participant commenced participation, whichever last occurs. . . .

1974 U.S. Code Cong. & Ad. News 5038, 5054-55.

Defendants' position is also consistent with the interpretation adopted by the agency charged with the responsibility to administer these new statutory provisions. Cf. *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450-51 (1978). Department of Treasury regulation 26 C.F.R. (1979) § 1.411(a)-7(b) is squarely supportive of that position, as is Revenue Ruling 78-120, 1978-1 C.B. 117, requiring special treatment below age 55.

Plaintiffs rely upon the meaning of "normal retirement age" as generally understood *prior* to the enactment of E.R.I.S.A. That argument cannot stand against the language of the statute and its legislative history. While plaintiffs cite an interpretive letter from A.D. Fields, Chief, Employee Plans Technical Branch (I.R.S.), which apparently supports their position (Exhibit A to plaintiffs' reply memorandum), that opinion likewise is overcome by the much weightier sources to the contrary.

Plaintiffs' claim that 57 is technically the "normal retirement age" under the new plan is the linchpin for several alleged E.R.I.S.A. violations. In view of our conclu-

sion that age 65 is the "normal retirement age" under § 1.16 of the new plan, the remainder of this decision addresses only plaintiffs' claims that do not depend upon their erroneous interpretation of "normal retirement age."

2. *Section 3.10 of the new plan should provide for a minimum vested pension for participants who were employed before February 1, 1976.* Section 3.10 of the new plan provides for the calculation of a vested pension. The participant becomes eligible under § 3.09 after 10 years of service if other pension alternatives are not available to him. Section 3.10 provides for a level of benefits which plaintiffs correctly contend is in part inconsistent with 26 U.S.C. § 411(b)(1)(D) and 29 U.S.C. § 1054(b)(1)(D). These sections provide in pertinent part as follows:

> (D) Subparagraphs (A), (B), and (C) shall not apply with respect to years of participation before the first plan year to which this section applies, but a defined benefit plan satisfies the requirements of this subparagraph with respect to such years of participation only if the accrued benefit of any participant with respect to such years of participation is not less than. . .
>
> (i) his accrued benefit determined under the plan, as in effect from time to time prior to September 2, 1974. . . .

Defendants contend that the old plan, dated August 1, 1973, contained no accrued benefit formula such as now appears in § 3.10 of the new plan and that therefore the foregoing subsection (i) is inapplicable. However, the old plan did provide for specific benefits to persons retiring at age 57 after 20 years of qualified service. Since the full benefit was $450.00 per month, 1/20th was implicitly accrued in each of the 20 years of qualified service. Thus § 3.10 of the new plan should be liberalized as proposed by plaintiffs in their filing of February 4, 1980.

3. *Defendants have failed to provide appropriate accrual for part-time service.* This claim attacks § 4.04 of the new plan, which allocates service credit on three broad bases: (1) those with less than 20 weeks of covered service receive no credit, (2) those with 20 but less than 35 weeks receive one-half credit, and (3) those with 35 weeks or more receive one full year's credit.

This rough allocation of credit is, in our opinion, contrary to 26 U.S.C. § 411(b)(3)(B), which provides as follows:

> (B) *Less than full time service.* For purposes of this paragraph, except as provided in subparagraph (C), in the case of any employee whose customary employment is less than full time, the calculation of such employee's service on any basis which provides less than a ratable portion of the accrued benefit to which he would be entitled under the plan if his customary employment were full time shall not be treated as made on a reasonable and consistent basis [such a basis is mandated by § 411(b)(3)(A).]

29 C.F.R. (1979) § 2530.200b-3(e)(ii) provides that each week of service be treated as the equivalent of 45 service hours. If each week is the equivalent of 45 hours, § 4.04 of the new plan gives no credit for less than 900 hours because it gives none for less than 20 weeks. The plan gives one-half year credit for 900 to 1574 hours, and a full year's credit for 157 or more hours. The regulations, however, offer two examples which are designed to satisfy the statutory requirement: (1) each employee with more than 1000 hours of covered service is granted credit on a pro rata basis, or (2) those with more than 1000 hours are granted a percentage of a full year's credit in gradations of 10 percent (29 C.F.R. (1979) § 2530.204-2(c)(4)).

Therefore, although defendants are not required by § 411(b)(3)(C) to grant credit for the first 1000 hours

(approximately 21 service weeks at 45 service hours per week), the statute and regulations require a more accurate pro rata credit thereafter. Section 4.04 of plaintiffs' proposed plan amendment, filed February 4, 1980, should be incorporated in the new plan, thus conforming it to the "ratable portion of the accrued benefit" requirement set forth in § 411(b)(3)(B).

4. *Section 3.08 of the new plan sets out a deficient schedule for awarding early retirement benefits.* Plaintiffs have demonstrated that the schedule in § 3.08 reduces early retirement benefits which were payable under the prior plan. (See paragraph 18 of the Amended Complaint which, although denied in defendants' answer, has subsequently been effectively conceded.) A reduction violates 26 U.S.C. § 411(d)(6), and 26 C.F.R. (1979) § 1.411(d)-3(b).

Defendants amended the new plan effective July 1, 1979, by permitting participants who entered covered employment prior to July 1, 1976 to choose the previous early retirement benefits. The amendment should have applied retroactively, in order to make it available to those persons who terminated their employment prior to the amendment.

Since the improper schedule contained in the new plan prior to the amendment could be re-adopted by the trustees, and since retroactivity is not specifically provided for, plaintiffs are entitled to injunctive relief on this phase of their case.

5. *Defendants have improperly reduced vested retirement benefits.* Under the old plan, an employee with 20 or more years of service was entitled to a deferred benefit payable for life after reaching the age of 65. (Article III, Sec. 18.) Under § 3.09 of the new plan, a vested pension benefit is available to those covered employees with more than 10 years of service, but, for employees with 20 or more years of service the deferred benefit is

less than would have been paid under the old plan. Thus the benefit level for these employees, when the employee is not eligible for some other plan benefit, has been reduced relative to the old plan. This also violates § 411 (d) (6).

Defendants contend that, in practice, the deferred benefit option available under the old plan is made available to covered employees who would have qualified thereunder. This practice is not spelled out in the new plan nor in its descriptive pamphlet. 29 U.S.C. § 1022(b) requires that the plan description and summary plan description describe all provisions for non-forfeitable benefits.

Therefore, the practice which defendants contend is available under the new plan should be specifically provided for, as contained in plaintiffs' proposed amendment to § 3.10, filed February 4, 1980.

Both parties have asked for attorneys' fees and costs pursuant to 29 U.S.C. § 1132(g). We perceive no ground for making such an award to defendants, and any award to plaintiffs will depend upon the proper interpretation and application of § 1132(g).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that plaintiffs file an order for declaratory and injunctive relief, agreed as to form, within fifteen (15) days of the entry hereof, which will accomplish the following amendments to defendants' plan as it now exists:

(1) Section 3.08 shall provide for early retirement benefits on at least the same terms as under the old plan, retroactively for those who terminated employment prior to July 1, 1979, without any further reduction by amendment;

(2) Section 3.10 shall provide for calculation of a vested pension, including appropriate accrual of benefits for covered service prior to 1976;

(3) Section 3.10 shall be amended to provide for a deferred benefit, as under the old plan, payable after 20 or more years of covered service at age 65;

(4) Section 4.04 shall provide a reasonable and consistent basis for calculating accrual of benefits for less than full time service.

Plaintiffs may also serve and file a motion for attorneys' fees and costs, supported by affidavits of the time expended and the qualifications of the attorney charging such time, to be briefed pursuant to Local Rule 13.

This case will be called for entry of a judgment order on Monday, September 8, 1980 at 11:30 a.m.

ENTER:

/s/ Thomas R. McMillen
Judge
U.S. District Court

DATED: July 24, 1980

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 78 C 841

Judge Thomas R. McMillen

WILLIAM R. JANOWSKI and ROBERT H. BARNHISEL, individually and on behalf of all others similarly situated,
Plaintiffs,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL NO. 710 PENSION FUND, *et al.*,
Defendants.

ORDER

This cause came on to be heard on the Plaintiffs' and Defendants' Cross Motions For Summary Judgment. Supporting briefs were filed on behalf of both parties. The Court has considered the pleadings and exhibits introduced, and the arguments of counsel.

A written Opinion dated July 24, 1980 was rendered by the Court on the Cross Motions for Summary Judgment. Pursuant to an agreed Order dated August 4, 1980, further proceedings were stayed until September 9, 1980. The Court, on September 8, 1980, ordered defendants to agree as to the form of amendments to the International Brotherhood of Teamsters Local No. 710 Pension Plan, implementing its opinion of July 24, 1980 on or before October 20, 1980. Defendants, having declined to so act.

IT IS ORDERED, ADJUDGED AND DECREED THAT:

(a) Plaintiffs have standing to sue as participants in the International Brotherhood of Teamsters Local No. 710 Pension Plan, pursuant to 29 U.S.C. 1132(a).

(b) Defendants' preliminary challenges to Plaintiffs' right to bring this action are denied.

(c) Defendants' official actions in connection with the adoption and implementation of amendments to the Local No. 710 Pension Plan which violate ERISA requirements are arbitrary and capricious as a matter of law.

(d) The Trustees' adoption in Section 1.16 of the Local No. 710 Pension Plan, effective February 1, 1976, of age 65 or the participant's age on the tenth anniversary of his participation in the Local No. 710 Pension Plan, whichever is later, as the "normal retirement age" for the purposes of the Plan is in compliance with ERISA. All of the plaintiffs' claims, which are based upon, arise out of or relate to plaintiffs' claim that age 57 is, or should be, the "normal retirement age" under the Local No. 710 Pension Plan effective February 1, 1976, are hereby dismissed with prejudice.

(e) Section 3.10 of the Local No. 710 Pension Plan is inconsistent with the requirements of 29 U.S.C. § 1054(b)(1)(D) and must be reformed to provide for the accrual of benefits at the rate of $22.50 for each year of credited service prior to February 1, 1976, subject to a maximum of $450.00.

(f) Section 4.04 of the Local No. 710 Pension Plan is contrary to the requirements of 26 U.S.C. § 411(b)(3)(B) and must be reformed to provide for a more accurate ratable portion of the accrued benefit for less than full-time service on a reasonable and consistent basis.

(g) Section 3.08 of the Local No 710 Pension Plan reduced early retirement benefits contrary to the requirements of 26 U.S.C. § 411(d)(6). Defendants amended the Plan effective July 1, 1979, by permitting participants

who entered covered employment prior to February 1, 1976, to choose the previous early retirement benefits. Since retroactivity is not specifically provided for in the July 1, 1979 amendments, the defendants are ordered to reform Section 3.08 to provide for such retroactivity; and are further enjoined from revoking such amendments.

(h) Section 3.10 shall be amended to provide for a deferred benefit, as under the Old Plan, payable after 20 or more years of covered service at age 65.

(i) Within 20 days, the Trustees are required either to amend the International Brotherhood of Teamsters Local No. 710 Pension Plan by adopting an amendment which is in a form substantially similar to the Amendment attached hereto as Exhibit A, or serve and file substitute provisions which are not inconsistent with the Court's written Opinion dated July 24, 1980, to be effective as of February 1, 1976.

(j) Defendants shall pay the plaintiffs' costs of this litigation plus reasonable attorneys' fees.

/s/ THOMAS R. MCMILLEN
Judge
United States District Court

Dated: Oct. 30, 1980

AGREED AS TO FORM:

/s/ Albert L. Grasso
For plaintiffs

For defendants

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 78 C 841

WILLIAM R. JANOWSKI and ROBERT H. BARNHISEL,
Plaintiffs,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL NO. 710 PENSION FUND, *et al.*,
Defendants.

DECISION ON FEES

Following our decision on the merits dated July 24, 1980, attorneys for plaintiffs filed a petition for attorneys' fees and expenses. They take no position concerning which of the defendants should be held responsible for their fees and expenses. The petition is opposed by defendants, primarily seeking a reduction.

Fees and expenses are clearly authorized by § 502(g) of E.R.I.S.A. which provides (29 U.S.C. § 1132(g)):

> In any action under this subchapter by a participant . . . the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

The foregoing statute makes it clear that the award of any attorney's fees is discretionary with the court and must be reasonable. As was our decision on the merits of the complaint, there is little guidance from other courts concerning the proper application of the statute. In our opinion the statute must be applied in

the light of cases in other fields of law to the extent they are relevant but that these cases are primarily valuable in guiding the exercise of the court's discretion, not as binding authority.

As far as the first step in the exercise of our discretion is concerned, we have no doubt that plaintiffs' attorneys are entitled to reasonable compensation for their successful prosecution of this case. *Newman* v. *Piggie Park Enterprise*, 390 U.S. 400 (1968). Defendants contend, *inter alia*, that plaintiffs were only partially successful, in that one of their principal contentions was not adopted by the court, but this is a matter to be considered in measuring the amount, not the entitlement. It is the rare case in which one side or the other is completely successful when several issues are involved. Particularly in a contested class action, there are many preliminary issues, including the issue of class certification in this case, on which plaintiffs do not always prevail. Discovery motions often are not decided in favor of the ultimately successful party. It is the prevailing party, not the wholly successful party, which is entitled to reasonable attorney's fees, in our opinion. The test for awarding any fees, therefore, is whether plaintiffs prevailed on the merits generally. Unless some claims were made recklessly or in bad faith, we do not believe that the attorney's fees for the prevailing plaintiffs should be based on the number of motions or issues on which they were successful. Otherwise, the fixing of reasonable fees would be reduced to a tabulation of minutiae rather than compensation for the general results achieved.

The next exercise of discretion involves the amount of a reasonable fee. This consists, usually, of three components: time expended, value or quality of the time, and a possible multiplier due to contingency features. cf. *Waters* v. *Wisconsin Steel Works*, 502 F.2d 1309, 1322 (7th Cir. 1974), *cert. denied* 425 U.S. 997 (1975); cf.

Copeland v. *Marshall*, —— F.2d ——, 23 FEP Cases (BNA) 967, 974-76 (D.C. Cir. 1980).

Defendants do not seriously challenge the amount of time expended by the attorneys for the plaintiffs in this case, other than raising the objection that all of the time was not spent on matters on which plaintiffs prevailed. The plaintiffs attorneys' affidavits show a total of 703.5 hours expended by them and 3.7 hours by paralegals. In other instances we have not allowed fees for paralegals when statutory language controls the award. In this case, § 502(g) applies to an "attorney's fee" and therefore the amount of time expended by paralegals is not covered. In this case the paralegals' time was logged for "court filings," not a legal function. It constitutes part of the general operating expenses, similar to that of secretaries and messengers. We therefore will not award any compensation for this particular expenditure of time, but the remaining 703.5 hours is eminently reasonable in view of the nature of this case.

The next component is the reasonable hourly charge for each attorney. The principal attorney representing plaintiffs, Albert L. Grasso, Esq., spent 576.6 hours and seeks compensation at the hourly rate of $100.00 an hour. Defendants point out that this attorney's time had previously been charged at $60.00 per hour in 1978 to $95.00 in 1980. This raises the question of whether fees are being awarded for the value of the attorney's work as of the time the fee petition is filed or as of the time when the services were rendered. Contested litigation by its very nature causes a delay of a year or more in evaluating an attorney's work, and this hiatus can be aggravated by an appeal, as is pending in this case. By the time the fees are actually paid (if ever), the combined effect of inflation and additional expertise will presumably increase the reasonable value of an experienced attorney's time, assuming that he remains active. Furthermore, in a contingency case such as this one, he and

his partners are being deprived of the use of any fees which would otherwise be paid either at the time when the services are performed or at the time when the fees are awarded. These considerations, in our opinion, tend to offset the defendants' objections sufficiently so that we find the proper criterion in this case is the reasonable value of the attorney's time as of the date when the petition is filed.

Mr. Grasso's affidavit amply supports his hourly rate of $100.00. His affidavit is amplified by one executed by a partner in another law firm where he worked from 1974 through September 1977. The lead attorney for the defendants has shown that his own hourly rate charged in this case was $90.00 an hour, and we take judicial notice of the fact that defendants' attorney and his firm represent many unions on a continuing basis which provides an inducement for maintaining an hourly rate over a continuing period of time which is lower than would be charged for transitory clients.

In short, we find that Mr. Grasso's hourly rate of $100.00 is fair and reasonable and is consistent with the rate charged by attorneys doing similar work in the City of Chicago. Having so found, it follows that the hourly rates charged by the other attorneys for plaintiffs with similar or greater expertise than Mr. Grasso is also fair and reasonable.

The fee which would be awarded to the plaintiffs' attorneys at the foregoing hourly rates total $71,502.50, according to our calculation. In addition, however, Mr. Grasso requests a multiplier of 3, and two of his partners request a multiplier of 2. Two other partners request no multiplier, presumably because of the small amount of work logged by them on this case. The difficult problem in this case is whether or not a multiplier should be used and, if so, how great a multiplier, particularly since plaintiffs did not prevail on one principal issue in this case.

A principal justification for a multiplier is the contingency of prevailing in representation. Plaintiffs' attorneys point out that had they been unsuccessful in this case, they would have received no fees. It was a case of first impression under E.R.I.S.A., with no help from any outside source, so the contingency of failure was not negligible.

A second justification for a multiplier is the financial results obtained. The judgment in this case will provide benefits averaging from $48,960 to $58,140 over the life expectancy of retirees whose benefits were fully vested by 1976, the actual amounts depending upon the starting date for eligibility and the duration of the retiree's life (affidavit of Marcus D. Grayck dated Oct. 17, 1980). The number of employees who will ultimately receive such benefits cannot be known as of now, but there are 15,302 participants presently in the plan. If only 1 percent actually receive the additional increments, their benefits will total almost $7,500,000. (No such figures, incidentally, were argued or considered in the merits of our decision.) Other benefits awarded by our decision are not included in the foregoing calculation but will be substantial. cf. *Copeland* v. *Marshall*, *supra*, at 23 FEP 986.

There can be no doubt, therefore, that plaintiffs have obtained a financial benefit for many members of the class. Without the diligence and ability of plaintiffs' attorneys, retirees under the defendant's fund and apparently under other employee pension funds would have been underpaid. On the other hand, plaintiffs' attorneys' fees will not be paid out of a fund which is being recovered from the defendants nor because of their illegal activities, as in *In re Folding Carton Antitrust Litigation*, 84 F.R.D. 245 (N.D. Ill. 1979) and in *Lindy Bros. Builders* v. *American Radiator & Standard Sanitary Corp.*, 540 F.2d 102 (3d Cir. 1973 and 1976). Nor can the benefits to be received by the class be accurately

computed even after the appeal, since they will continue to be received for an indefinite time. We therefore cannot find that this case is similar to most of those relied upon by plaintiffs. As in the case on the merits, this one is *sui generis*.

We find and conclude that a multiplier of 2 should be awarded in this case, for reasons similar to those discussed in *Lindy II*, *supra*. We see no good reason for awarding the higher multiplier request for Mr. Grasso over that requested for his two partners, even though his efforts and talents were primarily responsible for prosecuting this case. Any multiplier higher than 2 in our opinion would overlook the fact that plaintiffs were not wholly successful and that their attorneys' fees must be paid out of the pension fund itself, which is owned in equity by all participants and not solely by members of the class; also a multiplier higher than 2 is ordinarily used in cases where the defendants have been guilty of some knowing or at least notorious violation of the law.

This brings us to the final question of who should be responsible for payment of plaintiffs' fees. Defendants contend that whatever fees are paid must come out of the finite amount of the pension fund. If the fund were not sufficient to pay all the benefits, then defendants' contention that the fees must come out of benefits to be paid to persons not affected by our decision would be more plausible. However, plaintiffs point out that the fund now amounts to over $222,500,000 and that the plan's assets increased by more than $27 million over the payments of benefits during the fiscal year ending January 31, 1980. Finally, the fund itself paid $1,158,861 in attorney fees for fiscal year ending January 31, 1980, compared to which the fees for plaintiffs' attorneys would be a relatively small burden.

Although the trustees are necessary parties defendant and apparently have some type of insurance coverage, we do not find that they acted in bad faith or with an

intent to deprive the plaintiff class of proper benefits. They may have been negligent in failing to abide by certain requirements of E.R.I.S.A., or they may have relied on inadequate advice. In one instance, however, they failed to comply with one order which this court entered on July 24, 1980 to minimize the expenses to be incurred by plaintiffs and also to take advantage of the expertise which presumably was available to the defendants. Their dereliction was in failing to cooperate with plaintiffs to reach a declaratory judgment agreed to in form only and in drafting the necessary amendments to the pension plan. (See defendants' Statement of Position filed October 16, 1980.) Just how much additional expenditure of time by plaintiffs' attorneys after that date was caused by the refusal of defendant trustees to cooperate cannot be ascertained from the time sheets which have been filed. We therefore will ask them to segregate this particular portion of their time by affidavit, and this much will then be charged against the defendant trustees.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. Attorneys for the plaintiffs reasonably expended 703.5 hours in the prosecution of this case in the trial court. They are entitled to be compensated for this time at their regular hourly rates of $100.00 for Messrs. Grasso, Skirnick and Valiulis and at the rate of $125.00 for Messrs. Freed and Eiger.

2. The foregoing fees will be multiplied by 2 for Messrs. Grasso, Skirnick and Freed (the only attorneys seeking a multiplier) because of the contingent and unusually expert services performed by these attorneys in filing and prosecuting a complicated case of first impression for which no other attorneys or persons shared the burden.

3. Costs and expenses in the amount of $800.35 are awarded in addition, there being no contest as to the amount.

4. Attorneys for the plaintiffs will serve and file an appropriate judgment order, supported by an affidavit separating out the fees to be awarded against the defendant trustees in accordance with the foregoing decision.

This case will be called on Tuesday, February 17, 1981 at 11:30 at which time defendants may present their objections to the foregoing judgment order orally.

ENTER:

/s/ Thomas R. McMillen
Judge
U.S. District Court

DATED: Feb. 4, 1981

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 78 C 841

Judge Thomas R. McMillen

WILLIAM R. JANOWSKI and ROBERT H. BARNHISEL,
individually and on behalf of all others similarly situated,
Plaintiffs,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS
LOCAL NO. 710 PENSION FUND, *et al.*,
Defendants.

ORDER

This cause came on to be heard on the Plaintiffs' and Defendants' Cross Motions for Summary Judgment. A written opinion dated July 24, 1980 was rendered by the Court on the Cross Motions for Summary Judgment which provided, inter alia, for the award of plaintiffs' costs and reasonable attorneys' fees. Affidavits and supporting briefs were filed on behalf of both parties. The Court has considered the documents and the arguments of counsel.

An Order was entered on October 30, 1980 resolving all issues other than the amount of attorneys' fees and costs. A written opinion dated February 4, 1981 having been rendered by the Court on the issue of the amount of attorneys' fees and costs,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

(a) Attorneys for the plaintiffs reasonably expended 703.5 hours through October 6, 1980 and an additional

6.7 hours through January 19, 1981 in the prosecution of this case.

(b) Attorneys for the plaintiffs are entitled to compensation for the time expended at their regular hourly rates of $100.00 for Messrs. Grasso, Skirnick and Valiulis and at the rate of $125.00 for Messrs. Freed and Eiger.

(c) The foregoing fees will be multiplied by 2 for Messrs. Grasso, Skirnick and Freed (the only attorneys seeking a multiplier) for the reasons set forth in the opinion dated February 4, 1981.

(d) Taking the foregoing into account, defendants shall pay plaintiffs' reasonable attorneys' fees in the amount of $142,485.00. Of this amount, $1,940.00 shall be paid by the defendant trustees and the balance shall be paid by the defendant International Brotherhood of Teamsters Local No. 710 Pension Plan.

(e) Defendant International Brotherhood of Teamsters Local No. 710 Pension Plan shall reimburse plaintiffs for costs and expenses in the amount of $808.35, there being no contest as to the amount.

(f) There is no just reason to delay further the appealability of the Orders dated July 24, 1980, October 30, 1980 or this Order.

/s/ Thomas R. McMillen
Judge
United States District Court

Dated: Feb. 17, 1981

APPENDIX I

SUPREME COURT OF THE UNITED STATES

No. A-1130

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 710 PENSION FUND, ET AL.,
Petitioner.

v.

WILLIAM P. JANOWSKI, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 27, 1982.

/s/ JOHN PAUL STEVENS
Associate Justice of the Supreme Court of the United States

Dated this 7th day of July, 1982.

Office - Supreme Court, U.S.
FILED
AUG 27 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-151

In the
Supreme Court of the United States

OCTOBER TERM, 1982

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL NO. 710 PENSION FUND, ET AL.,
Petitioners,

v.

WILLIAM R. JANOWSKI, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

WHETHER, IN AN ACTION FOR BREACH OF FIDUCIARY DUTIES UNDER ERISA, PLAN PARTICIPANTS HAVE STANDING TO CHALLENGE A PLAN PROVISION WHICH HAS BEEN JUDICIALLY DETERMINED TO VIOLATE THE REQUIREMENTS OF ERISA?

WHETHER THE AWARD OF ATTORNEY'S FEES IN AN ERISA CASE WHICH BENEFITS A SUBSTANTIAL GROUP OF PLAN PARTICIPANTS IS AN ABUSE OF DISCRETION?

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Statement of the Case	1
Argument	5
I. In An Action For Breach Of Fiduciary Duties Under Erisa, Plan Participants Have Standing To Challenge A Plan Provision Which Has Been Judicially Determined To Violate The Requirements Of Erisa	5
II. The Award Of Attorney's Fees In An Erisa Case Which Benefits A Substantial Number Of Plan Participants Is Not An Abuse Of Discretion	8
Conclusion	13

TABLE OF AUTHORITIES

CASES

PAGE

Ashcroft v. *Planned Parenthood Ass'n of Kansas City, Missouri, Inc.*, No. 81-1623, *cert. granted*, 50 U.S.L.W. 3934 (May 24, 1982). 8, 13

Eaves v. *Penn*, 587 F.2d 453 (10th Cir. 1978). 9

Hardin v. *Kentucky Util. Co.*, 390 U.S. 1 (1968). 7

Hensley v. *Eckerhart*, No. 81-1244, *cert. granted*, 50 U.S.L.W. 3695 (March 1, 1982). 8, 13

Hummell v. *S.E. Rykoff & Co.*, 634 F.2d 446 (9th Cir. 1980). 9

Iron Workers Local 272 v. *Bowen*, 624 F.2d 1255 (5th Cir. 1980). 9

Linda R.S. v. *Richard D.*, 410 U.S. 614 (1973). 6

Mulqueeny v. *National Commission On the Observance of International Women's Year*, 459 F.2d 1115 (7th Cir. 1977). 6

O'Shea v. *Littleton*, 414 U.S. 488 (1974). 6

Trafficante v. *Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972). 6, 7

Waters v. *Wisconsin Steel Works of International Harvester*, 502 F.2d 1309 (7th Cir. 1978), *cert. denied*, 425 U.S. 997 (1975). 10

STATUTES

PAGE

29 U.S.C. §1132(a), Section 502(a) of ERISA. 3, 5, 6

29 U.S.C. §1132(g), Section 502(g) of ERISA. 9

42 U.S.C. §1988, Civil Rights Attorney's Fees Awards Act of 1976. 9

42 U.S.C. §2000e-5(k), Title VII of the Civil Rights Act of 1964. 9

OTHER

American Bar Ass'n Code of Professional Responsibility, Disciplinary Rule 2-106. 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-151

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL NO. 710 PENSION FUND, ET AL.,

Petitioners,

v.

WILLIAM R. JANOWSKI, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

Respondents, plaintiffs below, are participants in the pension plan of the International Brotherhood of Teamsters Local No. 710 Pension Fund ("the Plan").

The Plan prior to February 1, 1976, ("the pre-ERISA Plan") provided retirement benefits to participants who completed 20 years of service. Normal retirement benefits were paid to participants who retired at the normal retirement age of 57. Early retirement benefits were provided to participants who retired between ages 47 and 57. Deferred vested benefits at age 65 were provided to participants who terminated employment before age 50.

On April 21, 1976, the defendant Trustees amended the Plan ("the Amended Plan") retroactively to February 1, 1976. In the Amended Plan, the Trustees redesignated age 57 as the "Regular Retirement Age" and designated age 65 as the "Normal Retirement Age." By using the newly defined normal retirement age of 65 for determining benefits under the Amended Plan, the Trustees deprived participants who had been enrolled in the pre-ERISA Plan of the following ERISA rights and protections:

(a) The right to have actuarial reductions based upon age 57 rather than age 65 for benefits commencing prior to age 57;

(b) The right to have benefits commence at age 57 rather than at age 65; and

(c) The right to pre-retirement survivor benefits between ages 47 and 57 rather than between ages 55 and 65.

Under the pre-ERISA Plan, participants with at least 20 years of service were entitled to receive, depending upon their respective ages, either (a) $450 at age 57, (b) an amount which had been actuarially reduced from $450 if benefits commenced prior to age 57; or (c) $250 at age 65. In the case of participants who had completed the requisite 20 years of service prior to the amendment of the Plan, the Amended Plan disregards these benefits in calculating participants' accrued benefits. The Amended Plan also does not provide pro rata credit for the accrual of benefits by participants who are employed part-time.

Finally, the Amended Plan changed the method of calculating early retirement benefits and the benefits of vested participants who terminate employment prior to

age 50. Under the formula set forth in the Amended Plan, benefits are less for participants who early retire and vested participants with 20 years of service than the benefits provided by the pre-ERISA Plan.

Pursuant to 29 U.S.C. §1132, plaintiffs filed an Amended Complaint alleging that defendants breached their fiduciary duties by unlawfully reducing benefits already earned and depriving participants of benefits mandated by ERISA in amending the Plan contrary to law and the Plan itself. On February 2, 1979, the District Court certified the following class:

> All persons who are now, or who were as of February 1, 1976 members of Local 710 of the International Brotherhood of Teamsters and who have accepted early retirement or intended to do so under the terms of the Pension Plan of said Local 710 and whose early retirement benefits were or will be affected by the amendments to the Plan made as of February 1, 1976.

In its class certification opinion the District Court specifically determined that plaintiffs had standing to bring the lawsuit pursuant to 29 U.S.C. §1132.

More than a year after the filing of plaintiff's complaint, the Trustees further amended the Amended Plan effective July 1, 1979, to provide that participants could elect to receive the benefits upon early retirement or deferred vested retirement provided by the pre-ERISA Plan.

The District Court, by decisions on July 24, 1980, and October 30, 1980, on cross motions for summary judgment, granted defendants' motion and dismissed plaintiffs' claim that age 65 had been improperly designated as the normal retirement age in the Plan. Plaintiffs

appealed this conclusion. The District Court also granted plaintiffs' motion and ordered that the Amended Plan must be reformed to provide proper benefit accruals for service before 1976 and for part-time service. Because the Amended Plan had been amended to provide for the early retirement and deferred vested benefits about which plaintiffs had complained, further amendments were unnecessary, but the District Court enjoined defendants from acting to reduce such benefits. The court also denied various procedural defenses advanced by defendants, again finding that plaintiffs had the requisite standing. Defendants appealed the portions of the summary judgment orders adverse to them.

Defendants also appealed the Disrtict Court's orders of February 4 and 17, 1981, awarding plaintiffs attorneys' fees. Plaintiffs also appealed the fee award to the extent that the fee was reduced by reason of the decision on the retirement age issue.

The Court of Appeals for the Seventh Circuit on March 8, 1982, affirmed the District Court's decision in favor of plaintiffs on the various procedural issues, the part-time credit issue and the award of fees. The Court of Appeals also affirmed the decision in favor of defendants on the normal retirement issue and reversed the pre-1976 benefit accrual decision. The injunction was removed in the absence of evidence that the Trustees would deprive participants of the benefits now set forth in the Amended Plan. Each party was ordered to bear its own appeal costs.

Cross-petitions for rehearing were denied on April 7, 1982. Plaintiffs timely filed a Petition for a Writ of Certiorari seeking review of the decisions on the normal retirement age and pre-ERISA benefit accrual issues.

ARGUMENT

Respondents, plaintiffs below, respectfully submit that the questions presented for review in the Petition for a Writ of Certiorari filed on behalf of the International Brotherhood of Teamsters Local No. 710 Pension Fund and the Trustees of the Fund, defendants below, do not warrant further consideration by this Court for the reasons set forth below.

I

IN AN ACTION FOR BREACH OF FIDUCIARY DUTIES UNDER ERISA, PLAN PARTICIPANTS HAVE STANDING TO CHALLENGE A PLAN PROVISION WHICH HAS BEEN JUDICIALLY DETERMINED TO VIOLATE THE REQUIREMENTS OF ERISA.

This case arose as a result of a complaint by plaintiffs as Plan participants that defendants breached their fiduciary duties imposed by Title I of ERISA in amending the Plan in various respects contrary to the provisions of ERISA and the Plan itself. Among the specific allegations was the complaint that Section 4.04 of the Plan, dealing with the crediting of service, violated the requirements of ERISA.

Plaintiffs have maintained, and both the District Court and the Court of Appeals have held, that the Plan violates the part-time credit requirements of ERISA and must be reformed. Defendants' petition does not seek review of this ruling. (Def. Pet. p. 3). Defendants assert only that plaintiffs lack standing to challenge the invalidated part-time service credit provision of the Plan.

Plaintiffs' standing to sue is provided by Section 502(a) of ERISA, 29 U.S.C. Section 1132(a), which provides in relevant part:

> "A civil action may be brought — (1) by a participant or beneficiary — (B) to recover benefits due to him under the terms of his plan, or to clarify his rights to future benefits under the terms of the plan;
>
> (2) . . . by a participant . . . for appropriate relief under Section 409 [pertaining to relief for breaches of fiduciary responsibilities];
>
> (3) by a participant . . . to enjoin any act or practice which violates any provision of this title [I of ERISA] or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this title or the terms of the plan."

As decided by the District Court in its opinion certifying this matter as a class action:

> "Defendants also contend that plaintiffs lack standing because they have not yet been damaged by the amendments made on February 1, 1976. However, they are given the right to sue by Section 1132(a)(3) of E.R.I.S.A. See *Mulqueeny* v. *National Commission On the Observance of International Women's Year*, 549 F.2d 1115, 1120, n.15. (7th Cir. 1977)."

Plaintiffs' standing was reaffirmed by the District Court in its decision on cross-motions for summary judgment. (Def. App. E, at p. 29a).

Since plaintiffs are admittedly Plan participants, their standing is self-evident. By statute, participants have standing to enjoin acts or practices which violate ERISA and to redress such violations or to enforce any provision of ERISA. Defendants seek to deny plaintiffs this right. Standing to bring suit based upon rights created by statute is clearly recognized. *O'Shea* v. *Littleton*, 414 U.S. 488, 493 n.2 (1974); *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 n.3 (1973). See *Trafficante* v. *Metropolitan Life*

Ins. Co., 409 U.S. 205, 212 (1972) (White, J., concurring); *Hardin* v. *Kentucky Util. Co.*, 390 U.S. 1, 6 (1968).

Both the District Court and the Court of Appeals have determined that the part-time credit provision of the Plan does not satisfy the requirements of ERISA. The District Court specifically held "that if the plan amendments violate E.R.I.S.A. requirements, then defendants' official actions [in connection with the adoption and implementation of such amendments] are arbitrary and capricious as a matter of law." (Def. App. E, at p. 29a). Plaintiffs have standing to sue to correct such breaches of fiduciary duties by their Plan fiduciaries. Moreover, unless the Plan is amended to comply with ERISA, it is not a "qualified plan" and all participants, including plaintiffs, will suffer adverse federal income tax consequences from the loss of its "qualified" status.

Finally, contrary to the suggestion that the part-time service credit provision does not apply to plaintiffs, the fact is that it has applied every year that plaintiffs have been participants. The contested provision (Section 4.04 of the Plan) provides that:

> "A Participant shall be credited with Future Pension Credits on the basis of his weeks of work in Covered Employment for which Employer Contributions were paid in accordance with the following schedule:
>
> | Weeks Engaged In Covered Employment During Calendar Year | Future Pension Credits |
> |---|---|
> | Less than 20 weeks | None |
> | 20 but less than 35 weeks | ½ year |
> | 35 weeks or more | 1 year" |

Each year, contrary to law and the opinions of the courts below, plaintiffs became entitled to only one-half of a year's credit under the Plan until they worked thirty-five (35) weeks. At that time, they became entitled to a full year's credit under the Plan. Therefore, each year, until plaintiffs and all other participants complete 35 weeks of work, the illegal provision applies.

Plaintiffs' standing is thus provided not only by statute but also by actual applicability of the contested provision to plaintiffs. Further, plaintiffs will suffer economic detriment by virtue of the loss of the "qualified" status of the Plan if it is not amended to correct plaintiffs' complaint.

II

THE AWARD OF ATTORNEY'S FEES IN AN ERISA CASE WHICH BENEFITS A SUBSTANTIAL NUMBER OF PLAN PARTICIPANTS IS NOT AN ABUSE OF DISCRETION.

Defendants assert erroneously that the award of attorney's fees in this ERISA case raises an issue which this Court has already agreed to decide. In support, defendants refer to *Hensley* v. *Eckerhart*, No. 81-1244, *cert. granted*, 50 U.S.L.W. 3695 (March 1, 1982) and *Ashcroft* v. *Planned Parenthood Ass'n of Kansas City, Missouri, Inc.*, No. 81-1623, *cert. granted*, 50 U.S.L.W. 3934 (May 24, 1982), and assert that certiorari has been granted in *Hensley* and *Ashcroft* to resolve a conflict which has arisen among the Courts of Appeals. (Def. Pet. pp. 14-15, n. 12-13).

Neither *Hensley, Ashcroft,* nor any of the cases cited by defendants as illustrative of the conflict among the circuits, involve ERISA. All of these cases involve the

Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. §1988) or Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000a-5(k)). Under both Civil Rights Acts, attorney's fees may only be awarded to the "prevailing party". Each of the cases cited involves the calculation of attorney's fees under the "prevailing party" standard.

Unlike the Civil Rights Acts, 29 U.S.C. §1132(g), Section 502(g) of ERISA, does not condition attorney's fees upon prevailing in the litigation. Rather, it provides only that:

> "In any action under this title [I of ERISA] by a participant, beneficiary, or a fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party."

Cases interpreting the "prevailing party" standard under the Civil Rights Acts are inapposite to ERISA.

Contrary to defendants' assertions, the case law regarding the proper standards for awarding attorney's fees in ERISA cases is clear and consistent. See, e.g., *Iron Workers Local 272* v. *Bowen*, 624 F.2d 1255 (5th Cir. 1980); *Hummell* v. *S.E. Rykoff & Co.*, 634 F.2d 446 (9th Cir. 1980); *Eaves* v. *Penn*, 587 F.2d 453 (10th Cir. 1978).

Indeed, this case law is so clear and consistent that defendants have conceded at p. 8 of their Petition that:

> "The Court of Appeals agreed that Plaintiffs were entitled to an award under §502(g) of ERISA (*a point which we do not here contest*)." (Emphasis added).

Having conceded that an award of attorney's fees is appropriate, defendants contest only the amount of the fee award. As the Court of Appeals stated:

> "Finally, we consider the amount of the award. The district court carefully and thoroughly analyzed the complexity and unsettled nature of the questions involved, the expertise of the attorneys, and the time expended to arrive at the hourly rate of $100 and $125 and the multiplier of two. We adopt the district court's analysis and conclusion with respect to the amount awarded and, as a consequence, need not repeat it." (Def. App. A, at p. 18a).

The Court of Appeals' adoption of the District Court's careful analysis was proper. The District Court's analysis was based upon the Court of Appeals' prior decision in *Waters* v. *Wisconsin Steel Works of International Harvester*, 502 F.2d 1309, 1329 (7th Cir. 1978), *cert. denied*, 425 U.S. 997 (1975), which adopted the standards for fee awards set forth in Disciplinary Rule 2-106 of the American Bar Association Code of Professional Responsibility.

Disciplinary Rule 2-106 indicates that the factors to be considered as guides in determining the reasonableness of a fee include the following:

> "(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
>
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
>
> (3) The fee customarily charged in the locality for similar legal services.
>
> (4) The amount involved and the results obtained.
>
> (5) The time limitations imposed by the client or by the circumstances.
>
> (6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent."

The District Court was presented with a fee petition including detailed time records for all attorneys performing services on behalf of plaintiffs, the transcript of defendants' deposition of plaintiffs' counsel, affidavits of other attorneys with expertise in the field, and three legal memoranda. Such materials enabled the District Court to exercise properly its discretion in a manner consistent with the *Waters* guidelines. Defendants, in fact, argued to the District Court that the *Waters* guidelines were appropriate. Both the District Court and Court of Appeals agreed. Defendants do not now have cause for further complaint meriting this Court's attention.

Predictably, defendants seek to minimize the merits of plaintiffs' efforts on behalf of the class. It is uncontested that the additional benefit accruals for part-time employment which plaintiffs have won represent aggregate additional benefits to participants amounting to several millions of dollars. Moreover, the right of participants to receive the greater early retirement benefits and deferred vested benefits under the pension plan prior to 1976 had been omitted from both the Plan and the summary plan description. As a result of plaintiffs' efforts, these provisions are now clearly set forth in the Plan and the summary plan description.

Various procedural aspects of ERISA litigation have also been clarified as a result of plaintiffs' efforts. Even with respect to the two issues (of first impression) which plaintiffs lost and for which a separate petition is pending before this Court, the applicable law has become clearer. As the Court of Appeals stated:

> "Nevertheless, we believe that this award is justified because the litigation benefitted a substantial group of Fund participants and that the award is necessary to enable aggrieved parties to invoke the power of the court when pre-ERISA benefits are in danger. The award of fees is not an abuse of discretion." (Def. App. A, at p. 18a).

Finally, defendants misrepresent the District Court's references to the size of the pension fund's assets and the fund's payment of legal fees in excess of $1,000,000 to its own attorneys. The factors about which defendants complain were not considered by the District Court in connection with the determination of the amount of the fee as suggested by the defendants. Rather, *after* determining the amount of the attorney's fee award, the District Court stated:

> "This brings us to the final question of who should be responsible for payment of plaintiffs' fees. Defendants contend that whatever fees are paid must come out of the finite amount of the pension fund. If the fund were not sufficient to pay all the benefits, then defendants' contention that the fees must come out of benefits to be paid to persons not affected by our decision would be more plausible. However, plaintiffs point out that the fund now amounts to over $222,500,000 and that the plan's assets increased by more than $27 million over the payments of benefits during the fiscal year ending January 31, 1980. Finally, the fund itself paid $1,158,861 in attorneys fees for fiscal year ending January 31, 1980, compared to which the fees for plaintiffs' attorneys would be a relatively small burden." (Def. App. G, at p. 45a).

Plaintiffs took no position regarding the source of payment of the attorney's fees. If the defendant trustees

desire to pay the fees from their own funds, plaintiffs have no objection.

In sum, defendants have conceded that a fee award is appropriate; the District Court and the Court of Appeals carefully reviewed the facts supporting the award of attorney's fees; and there is substantial evidence in support of their decision. Both courts in fact followed the guidelines suggested by defendants themselves. Further, the matters pending before the Court in *Hensley* and *Ashcroft* involve a statutory interpretation which is not applicable to either ERISA in general or this case in particular. Therefore, there is no conflict among the courts regarding the applicable standards to be applied.

CONCLUSION

For the reasons indicated, the Petition for a Writ of Certiorari of defendants-petitioners should be denied.

Respectfully submitted,

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PETITIONERS' REPLY MEMORANDUM

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TABLE OF CONTENTS

	Page
I. THE JUDGMENT BELOW SHOULD BE SUMMARILY REVERSED ON THE AUTHORITY OF *BLUM* v. *YARETSKY*	1
II. THE ISSUES CONCERNING THE ATTORNEYS' FEES AWARD ALSO MERIT REVIEW	3
CONCLUSION	6

TABLE OF CITATIONS

CASES:

Ashcroft v. Planned Parenthood Association of Kansas City, Mo., Inc., No. 81-1623, *cert. granted*, —— U.S. ——, 50 L.W. 3934 (May 24, 1982)	4, 5
Blum v. Yaretsky, —— U.S. ——, 50 L.W. 4859 (June 25, 1982)	1, 2, 3, 6
Gladstone Realtors v. Village of Bellwood, 441 U.S. 91	2
Hensley v. Eckerhart, No. 81-1244, *cert. granted*, —— U.S. ——, 50 L.W. 3695 (March 1, 1982)	4, 5
Northcross v. Board of Ed., Memphis City Schools, 611 F.2d 624 (C.A. 6)	5
Oliver v. Kalamazoo Bd. of Ed., 576 F.2d 714 (C.A. 6)	5
O'Shea v. Littleton, 414 U.S. 488	2
SEC v. Chenery Corp., 318 U.S. 80	2
Warth v. Seldin, 422 U.S. 490	3

CONSTITUTION AND STATUTES:

United States Constitution: Article III	1, 2, 3
Civil Rights Act of 1964, Title VII, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.*	4
Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C. § 1988	4

TABLE OF CITATIONS—Continued

	Page
Employee Retirement Income Security Act of 1974, 88 Stat. 891, as amended, 94 Stat. 1295, 29 U.S.C. §§ 1001 *et seq.*:	
§ 404	2
§ 502(a)(1)	3
§ 502(a)(3)	3
§ 502(g)	4

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PETITIONERS' REPLY MEMORANDUM

I. THE JUDGMENT BELOW SHOULD BE SUMMARILY REVERSED ON THE AUTHORITY OF *BLUM* v. *YARETSKY*.

Plaintiffs-respondents studiously avoid discussion of *Blum v. Yaretsky*, —— U.S. ——, 50 L.W. 4958 (June 25, 1982) ("*Yaretsky*") and the other Article III decisions of this Court which establish that their challenge to the part-time service credit provision of petitioners' plan is not justiciable (Pet. 9-12).[1] They simply ignore

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[1] "Pet." will refer to Petition for Certiorari; "App." will refer to the Appendix to the Petition; and "Br. Opp." will refer to the Respondents' Brief in Opposition to the Petition.

the ripeness requirement (Pet. 11-12). As to standing, they advance new theories which were not adopted by either court below and which, as we briefly show, are entirely baseless.

In rephrasing the first Question Presented and in their argument (Br. Opp. i, 5-7) plaintiffs characterize this as an action to enforce the trustees' "fiduciary" obligations. While the complaint did allege a breach of fiduciary duty, none was found by either court below.[2] Plaintiffs' hypothesis that the plan's part-time service credit accrual formula (which I.R.S. had approved, Pet. 3), jeopardized the plan's tax-qualified status (Br. Opp. 7) is also unsupported by anything in the decision below. It thus impermissibly "take[s] us into the areas of speculation and conjecture" (*Yaretsky*, 50 L.W. at 4861, quoting *O'Shea v. Littleton*, 414 U.S. 488, 497, see Pet. 10). Finally, the fact that this formula "has applied every year that plaintiffs have been participants" (Br. Opp. 7) is irrelevant. Their resort to this circumlocution only confirms that even now they cannot assert that either "personally has suffered some actual or threatened injury" as a result of the part-time service credit formula, as Article III requires (*Yaretsky*, 50 L.W. at 4861, quoting *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99, see Pet. 9.)

While plaintiffs' belated theories of standing were not those of either court below, they share one important

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[2] It is, of course, uncontroverted that the trustees of the plan are fiduciaries. "But to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? * * *" (*SEC v. Chenery Corp.*, 318 U.S. 80, 85-86). Here the trustees owe a fiduciary duty to all participants to perform duties set forth in § 404 of ERISA, which do not include adherence to the vesting and accrual rules set forth in other ERISA provisions. And even if trustees also owed to participants a fiduciary duty not to injure them in violation of those statutory rules, this would not aid the present plaintiffs who were not injured by the part-time service credit formula.

characteristic with the Court of Appeals' interpretation of § 502(a)(1) and the District Court's interpretation of § 502(a)(3) (see Pet. 12-13 and n.11): Each would entitle *every* participant in a pension plan to challenge the legality of *every* provision of that plan. Plaintiffs neither dispute that this would seriously burden the federal courts, nor that the statutory issue is therefore important (Pet. 13-14). Moreover, plaintiffs miss the principal thrust of Point I of our petition when they argue that "[s]tanding to bring suit based upon rights created by statute is clearly recognized" (Br. Opp. 6, citing cases). We readily acknowledged this at Pet. 13, but stressed "Article III's requirement [that] the plaintiff still must allege a distinct and palpable injury to himself * * *" (*id.*, *quoting Warth v. Seldin*, 422 U.S. 490, 501).

Because plaintiffs have failed to satisfy either the standing or ripeness requirements of Article III and the Court of Appeals did not even consider the *constitutional* standards of justiciability, certiorari is clearly warranted. Indeed, we submit that the authority of *Yaretsky*, which issued after the Court of Appeals' decision herein, is so compelling that the judgment below should be summarily reversed.

II. THE ISSUES CONCERNING THE ATTORNEYS' FEES AWARD ALSO MERIT REVIEW.

Plaintiffs also recast the Questions Presented with respect to the attorneys' fee award. They treat the issue as if it were whether the District Court abused its discretion in determining that an award of attorneys' fees is appropriate (Br. Opp. i, 8-9). But plaintiffs ultimately acknowledge that "defendants contest only the *amount* of the fee award" (Br. Opp. 9, emphasis added). The function of plaintiffs' diversionary tactic is to lay a basis for differentiating this case from the two cases in which this Court has already agreed to consider whether, in calculating the attorneys' fees to be awarded a plain-

tiff, the court may include time spent by his attorneys in litigating a claim on which the defendant, rather than the plaintiff prevailed: *Hensley v. Eckerhart*, No. 81-1244 and *Ashcroft v. Planned Parenthood Association of Kansas City, Co., Inc.* No. 81-1623 (see Pet. 14-15). Plaintiffs observe that 42 U.S.C. § 1988 (under which *Hensley* and *Ashcroft* arise), and § 706(k) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(k) (under which some of the other cases cited at Pet. 14-15 arose), provide that fees may be awarded to the "prevailing party", whereas § 502(g) of ERISA does not refer to the "prevailing party" (Br. Opp. 9). But if this difference in language has any significance at all (and we think it does not)[3] it pertains only to the issue injected by plaintiffs, and not to any which is presented by the Petition.

With respect to the *amount* of the award, the language of each of these statutory provisions is identical—all refer to "a reasonable attorney's fee". Plaintiffs advance no reason—let alone one of principle—why the award in this case may stand if this Court determines in the presently pending cases that in calculating the fee award an apportionment must be made between time spent on successful claims and time spent on unsuccessful claims. In statutory terms it is no more "reasonable" (and it is no more logical or fair) to require an ERISA defendant to pay for the time spent by his adversary in litigating a claim on which the defendant has prevailed than it is to impose such a burden on the defendant in a civil rights

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[3] While the issue is not presented, we cannot silently acquiesce in the suggestion that § 502(g) authorizes the award of attorney's fees and costs to the *losing* party. Such a radical departure from the accepted practice under both the American rule (which requires each party to pay its own fees) and those statutes which authorize the award of fees to *successful* parties, ought not to be attributed to Congress in the absence of compelling evidence that this was intended. There is no such evidence and neither the cases cited at Br. Opp. 9, nor any others that we have seen suggest that the trial courts have discretion to award attorneys' fees *against* a party which wins the entire case.

case. Accordingly, the attorneys' fee award must be reversed if the apportionment issue is decided in favor of the defendants in *Hensley* or *Ashcroft* (see Pet. i, Question 2. a)).

Moreover, it is doubly difficult to justify awarding the plaintiff *twice* the hourly rate for time spent in litigating unsuccessful claims (see Pet. 21). We note that in *Northcross v. Board of Ed., Memphis City Schools*, 611 F.2d 624, one of the minority of appellate decisions which do not require apportionment (Pet. 15, n.13) the Sixth Circuit held that a multiplier is improper (611 F.2d at 138), following that Court's *Kalamazoo Board of Ed.* decision (Pet. 21). Plaintiffs choose to ignore the conflict in the circuits on this recurring issue in fee calculation.

In attempting to justify the $142,485 award plaintiffs assert that their success on the part-time service credit formula is worth "several millions of dollars" (Br. Opp. 11), and even rely on their efforts in connection with two issues on which the Court of Appeals, reversing the District Court, denied plaintiffs all relief (Compare Br. Opp. 11 with App. 14a-15a). While we consider plaintiffs' evaluation of their own services to be grossly exaggerated,[4] the essential point for present purposes is that it is unsupported by findings. Thus, neither court below justified the award on the basis that plaintiffs conferred the benefits which they now claim. Plaintiffs' new "benefits" theory therefore unwittingly reinforces our submission that the majority of the Court of Appeals departed from the proper course of adjudication when it "adopt[ed] the district court's analysis and conclusion with respect to the amount awarded" (App. 18a), although it had

[4] The courts below required an increase in benefit accruals only for participants who work between 21 and 34 weeks in a year (App. 13a). Thus their ruling does not at all benefit the vast majority of plan participants (including plaintiffs) who work full time, nor casual or other employees who work up to 20 weeks.

reversed the district court with respect to three of four claims, including the "implied accrual" on which the District Court relied most heavily in determining that amount. (See Pet. 18-21, and App. 20a (Fairchild, J., dissenting).)

CONCLUSION

For the reasons stated in the Petition and herein the Writ of Certiorari should be granted. As explained in Point I hereof, we submit that summary reversal on the justiciability question is appropriate.

Respectfully submitted,

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